THE NEW ILLEGITIMACY: TYING PARENTAGE TO MARITAL STATUS FOR LESBIAN CO-PARENTS

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INTRODUCTION

Should a child be allowed two legal parents only if born into a marriage? For children of heterosexual parents, the answer, today, is definitively "no." Constitutional protection for parental rights does not permit the ties between an unwed father and his child to be severed simply because he is not married to the child's mother. But the answer is often different for the child of a lesbian mother. In a recent opinion, *Debra H. v. Janice R.*, the New York Court of Appeals ruled that a lesbian co-parent—a woman who had participated in the conception, birth, and early rearing of her partner's biological child—was the child's second legal parent, but *only* because the two women had entered into a civil union during the pregnancy.[1] Her functional participation as a co-parent was deemed irrelevant; it was not a basis on which parentage could be assigned.[2] Legal parentage was derived,

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1. Debra H. v. Janice R., 930 N.E.2d 184, 195-96 (N.Y. 2010).
2. *Id.* at 188.

instead, from the marital status of the child's biological mother.[3] This symposium was convened to consider the implications of this "new illegitimacy"—a regime in which the rights and welfare of the children of lesbians are dependent on the marital status of their parents, reminiscent of an almost forgotten era in which the same was widely true for all children.

The law governing lesbian co-parentage is complicated and varies a great deal by jurisdiction. In some states, the lesbian co-parent is a legal stranger to the child of her partner regardless of any steps taken to establish a parent-child relationship. In others, she can gain full "legal parent" status by virtue of a so-called second-parent adoption. In some, even without the benefit of adoption, she can be recognized as a quasi- or de facto parent, with varying and sometimes uncertain rights vis-à-vis her partner's child, based on the functional relationship between them. The authorization of same-sex marriage and marriage-equivalent statuses in several states has created a fourth possibility: parentage based on marital status. In some states, a lesbian co-parent can gain legal parent status by virtue of being married to, or having a civil union with, a child's biological mother. She is a legal parent of children born to her spouse or civil union partner in the same way a husband is often considered the legal father of children born to his wife during their marriage, regardless of his genetic tie to them.

Although this last category is made possible by the success of the gay marriage movement—same-sex couples now *can* marry or obtain some equivalent status in more than a quarter of the states—the connection between parentage and marital status can be deployed to restrict, as well as to expand, the rights of non-biological mothers to gain recognition as legal parents. Can the non-biological mother *only* gain legal parentage status through formal legal ties like marriage or adoption, rather than based on the existence of functional parent-child relationships or the intent of the parties at the time of conception or birth to act as co-parents? That was the holding in *Debra H.*, which is perhaps reflective of a disturbing broader trend.

This development is ironic not only because it reflects a dramatic turnaround in the acceptance of same-sex marriage—something once verboten is now an essential gateway to other rights—but also because it contravenes a longstanding trend in law to disentangle legitimacy and parentage. While unwed fathers were once not considered fathers at all simply because they were not married to the mother of their children, today they can gain legal parent status regardless of marital status. Marriage can provide a shortcut for men—or their children—to establish a legal parent-child relationship; but, under modern constitutional principles, marriage

3. *Id.* at 195-96.

cannot be the exclusive mechanism by which parentage can be obtained. For the most part, in this context, the question "who is a parent" is divorced from the question of whether the adults have a formal legal relationship with one another.

This Article will argue that the entanglement of legitimacy and parentage for children of lesbian co-parents is not only bad for the affected adults and children, but also counter to the more general and sensible trend in parentage law. The general trend is to treat a child's legitimacy—whether her parents are married?—and her parentage—who are her legal parents?—as entirely separate questions. Developments in the law of unwed fatherhood best exemplify this trend and reflect sound reasoning about the best way to serve the needs of children and the adults who raise them.

This Article will proceed in three parts. First, it will consider the opinion in *Debra H.* and the connection it draws between legitimacy and parentage. This Section will also consider the general legal landscape for lesbian co-mothers—in what ways can they establish legal parentage in different jurisdictions? Second, it will examine the law of unwed fatherhood to trace the trend towards disentangling questions of legitimacy and parentage. Third, it will consider how best to conceptualize the rights of unmarried, lesbian co-parents.

I. *DEBRA H.* AND THE LAW OF PARENTAGE FOR LESBIAN CO-MOTHERS

The New York Court of Appeals' ruling in *Debra H. v. Janice R.* was the impetus for the organization of this symposium, as well as an indicator of the growing level of confusion in the law of lesbian co-parentage. But the decision is just one of many provocations to reconsider a basic question in the age of the new family: to whom do children belong? Whether and on what basis a lesbian co-parent might be entitled to legal parent status turns on the law's view of what makes someone a parent. In *Debra H.*, the court ruled that a lesbian co-parent *was* entitled to legal parent status with respect to her partner's biological child, but only because the two women had entered into a civil union before the child was born.[4] The fact that the plaintiff had both intended to and actually served as a social parent from the beginning was of no relevance, given the court's view that parentage could be derived only from biology, adoption or marital status.[5] Notably, the court rejected the de facto parentage doctrine as an alternative means of establishing parentage for a lesbian co-parent.[6] This section will consider the various methods by which lesbian co-parents might, in different jurisdictions, obtain legal parent status.

4. *Id.*
5. *Id.* at 188-89.
6. *Id.*

To understand *Debra H.*, we must first consider the general landscape for establishing parent-child relationships within the context of planned lesbian families. The law is complicated, variable, and in a constant state of flux. But some general observations can be made nonetheless. In every state, a woman who gives birth to a child—outside of an enforceable surrogacy agreement—is the legal mother of that child. A single woman who adopts a child has a similarly invulnerable, legal parent-child relationship with the adopted child. Thus, in a lesbian co-parenting arrangement, the biological or adoptive mother's legal parent status is both automatic and secure. Her partner, however, may or may not also be deemed a legal mother, depending on the jurisdiction and the steps taken to secure the legal relationship between the co-parent and the child.

A. Second-Parent Adoption

In several states, a lesbian co-parent can adopt her partner's biological or adopted child, as long as the first legal mother consents and joins the petition.[7] This type of adoption is "modeled on step-parent adoption, a statutory scheme that allows a biological (or adoptive) parent's spouse to adopt a child without terminating that parent's rights, thereby leaving the child with two parents."[8] The Massachusetts Supreme Judicial Court was the first state supreme court to countenance such an adoption, in its 1993 ruling in *Adoption of Tammy*.[9] Susan Love, a nationally known breast cancer surgeon, gave birth to a daughter, Tammy, using sperm donated by her female partner's cousin.[10] The donor surrendered his parental rights, but Helen Cooksey, the intended co-parent, was not naturally entitled to legal parent status even though she did have at least a remote genetic tie to the child.[11] Instead, the two women jointly petitioned to adopt Tammy.[12] The governing statute did not explicitly rule out adoption by an unmarried couple, and the court allowed it to take place, given the rich evidence—including testimony by psychologists, teachers, a priest and a nun—of the

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7. THE FAMILY EQUALITY COUNCIL, STATE-BY-STATE: SECOND PARENT ADOPTION LAWS (2008), *available at* http://www.d1083684.domain.com/down/secondparent_withcitations.pdf (surveying state laws on second-parent adoptions). On the development of second-parent adoption for same-sex couples, see generally, JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 320-29 (2011).

8. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 205 (2009).

9. 619 N.E.2d 315, 318 (Mass. 1993).

10. *Id.* at 316.

11. *Id.*

12. *Id.* at 315.

stable family unit the two women provided for the child.[13] The Supreme Court of Vermont approved a lesbian second-parent adoption the same year.[14] Since 1993, a number of states have begun, either via statute or appellate court ruling, to allow second-parent adoptions by a same-sex partner; and, in still other states, lower court rulings have clearly approved such adoptions, even in the absence of an explicit ruling or statute permitting them.[15] When the California Supreme Court ruled in favor of same-sex second-parent adoptions in 2003, in *Sharon S. v. Superior Court*, more than 20,000 such adoptions had been granted.[16]

But the landscape is still very mixed on the permissibility of these adoptions. In four states, appellate courts have ruled that second-parent adoptions are not permitted, either generally or for same-sex couples.[17] Notably, the North Carolina Supreme Court ruled, in a child-custody hearing, that the second-parent adoption granted by a trial court several years earlier was void, and that all other second-parent adoptions granted by North Carolina courts were also invalid because they went beyond the parameters of the adoption statute.[18] By statute, Utah bars adoptions by all unmarried couples; Mississippi does so for all same-gender couples, regardless of marital status.[19] Arkansas voters passed a referendum in 2008

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13. *Id.* at 317-18.

14. *See* Adoption of B.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993) (holding that adoption does not require termination of the natural mother's parental rights when the adoption is between the natural mother and her partner and is in the best interests of the children).

15. *See, e.g.*, CAL. FAM. CODE § 9000(f) (West 2012) (allowing adoption of a child by a domestic partner); COLO. REV. STAT. §§ 9-5-203(1), 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5) (2012) (recognizing second parent adoption); CONN. GEN. STAT. § 45a-724(3) (2012) (enabling a person who shares parental responsibility for the child to adopt); VT. STAT. ANN. tit. 15a, § 1-102(b) (2012) (allowing adoption of child by a partner if a family unit consists of a parent and the partner and adoption is in the best interest of the child). On second-parent adoptions generally, see Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures, and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933 (2000).

16. 73 P.3d 554, 568, 572 (Cal. 2003).

17. *See, e.g.*, *In re* Adoption of Luke, 640 N.W.2d 374, 376-77 (Neb. 2002) (concluding that Nebraska's adoption statutes prohibit two unmarried persons from adopting a minor child together); Boseman v. Jarrell, 704 S.E.2d 494, 496, 499 (N.C. 2010) (concluding the adoption statute requires termination of biological parents' rights upon direct placement adoption); *In re* Adoption of Doe, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998) (construing the Ohio adoption statute to permit adoption by an unmarried adult only if the biological parents' legal rights are terminated); *In re* Angel Lace M., 516 N.W.2d 678, 685-86 (Wis. 1994) (prohibiting adoption by a mother and her female cohabitant because the proposed adoption failed to satisfy essential elements of the adoption statute).

18. *Boseman*, 704 S.E.2d at 502.

19. *See* MISS. CODE ANN. § 93-17-3(5) (2012) ("Adoption by couples of the same gender is prohibited."); UTAH CODE ANN. § 78B-6-117 (2012) ("A child may be adopted by . . . adults who are legally married . . . . A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of the state.").

to preclude adoption or foster-parenting by any individual who was "cohabiting with a sexual partner" outside of marriage.[20] But, three years later, the Arkansas Supreme Court struck down this law as a violation of the right of privacy protected by the Arkansas constitution.[21] Florida still has a statute on the books barring homosexuals, whether as individuals or as part of a couple, from adopting, but an appellate court struck down the statute on state constitutional grounds, and the attorney general declined to file an appeal.[22]

Where otherwise available, the second-parent adoption can also be used to secure a second parent for an adopted child. If a child is adopted from a state or foreign country that does not allow either unmarried or same-sex couples to adopt, it is typical for one partner to adopt as a single parent, followed by a second-parent adoption for the other partner. And her partner has generally the same options for securing a parent-child relationship. Regardless of whether the first mother gives birth or adopts a child, the second-parent adoption is the most reliable way to secure legal parent status for the lesbian co-parent because an adoption decree is entitled to full faith and credit in other states, even in those that are very hostile to same-sex relationships or gay parenting. An appellate court in Florida gave effect to a Washington state decree of second-parent adoption that had been granted to a lesbian couple.[23] The two women had broken up, and the non-biological mother pointed to Florida's clear public policy against adoption by gays and lesbians.[24] But the court refused to depart from the exacting rules of full faith and credit; the parent-child relationship created by the adoption decree was secure.[25]

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20. ARK. CODE ANN. § 9-8-304, *invalidated by* Dep't of Human Servs. v. Cole, 2011 Ark. 145 (2011).

21. *See Cole*, 2011 Ark. at 149.

22. *See In re* Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 81 (Fla. App. 2010); *see also* Joanna L. Grossman, *Will Gays and Lesbians in Florida Finally Gain the Right to Adopt Children?*, FINDLAW'S WRIT (Oct. 26, 2010), http://writ.news.findlaw.com/grossman/20101026.html (describing challenges to Florida's gay adoption ban).

23. *See* Embry v. Ryan, 11 So. 3d 408, 409-10 (Fla. App. 2009); *see also* Finstuen v. Crutcher, 496 F.3d 1139, 1151 (10th Cir. 2007) (invalidating state constitutional amendment that bars recognition of final adoption orders from other states by same-sex couples because it violates the Full Faith and Credit Clause); Russell v. Bridgens, 647 N.W.2d 56, 58-60 (Neb. 2002) (noting that courts must give full faith and credit to a Pennsylvania same-sex co-parent adoption unless the challenging party can prove the court lacked subject matter jurisdiction); Starr v. Erez, No. COA99-1534 (N.C. Ct. App., Nov. 27, 2000). A New York court allowed a same-sex couple to jointly adopt the biological child of one of the partners, even though the co-parent already had enforceable parental rights because the couple had legally married in the Netherlands. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 692-93 (Sur. Ct. 2009). The court held that "the best interests of this child require a judgment that will ensure recognition of both Ingrid and Mona as his legal parents throughout the entire United States." *Id.*

24. *Embry*, 11 So. 3d at 409.

25. *Id.* at 409-10.

B. De Facto Parentage: An Overview

When a second-parent adoption is not available or, for whatever reason, not sought, the rights of the lesbian co-parent become much murkier. In some states, courts or the legislature have recognized either full parental or quasi-parental status based on a functional parent-child relationship. This type of recognition can fall under many different doctrinal labels—de facto parentage, psychological parentage, in loco parentis, or parent by estoppel, to name the most common ones—and can assume many different forms. But the common feature of any such doctrine is that it enables an adult without any formal *legal* ties to a child to be granted legal parent, or at least parent-like, status. States that do recognize de facto or psychological parentage disagree about the scope of the rights that accompany such a status. In a few states, once a third party has established de facto or psychological parent status, she stands in parity to a legal parent.[26] In others, such a status gives rise only to a potential claim for visitation, but not a full-fledged right to seek custody based solely on the best interests of the child.[27]

The first appellate case to recognize a lesbian co-parent as a "de facto parent" was *In re Custody of H.S.H.-K.*[28] In this 1995 case, the Wisconsin Supreme Court relied on the concept of de facto parentage to allow a lesbian co-parent, who was not related to the child by blood or adoption, to seek visitation over the objection of the child's biological mother.[29] Elsbeth Knott and Sandra Lynne Holtzman were intimate partners and planned together to start a family.[30] Knott became pregnant via artificial insemination in 1988 and gave birth to a child in December of that year.[31] Holtzman participated in every aspect of pregnancy and childbirth, including taking leave from work to care for the newborn child; they gave the child a combined surname, were both named as parents at a religious dedication ceremony, and shared child-care responsibilities.[32] For the first four years of the child's life, the two women functioned in every way as co-parents.[33] The two women ended their relationship early in 1993, but

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26. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000) (holding that the psychological parent "stands in parity with the legal parent," and "[c]ustody and visitation issues between them are to be determined on a best interests standard").

27. *See, e.g.*, *In re* H.S.H.-K, 533 N.W.2d 419, 420 (Wis. 1995) (noting that custody cannot be granted to a de facto parent without evidence that the legal parent is unfit).

28. *See id.* at 421.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 421-22.

33. *Id.*

agreed to continue living under the same roof for the sake of the child.[34] Nonetheless, Knott moved out with the child a few months later and, after another year, cut off all contact between Holtzman and the child.[35] Holtzman filed a petition for custody and a petition for visitation shortly thereafter.[36]

Under the Wisconsin code, courts were given jurisdiction to adjudicate custody in the wake of an annulment, divorce, or separation.[37] The Wisconsin Legislature also expressly gave courts the authority to place a child with a non-parent, in the event both parents were unfit or unable to care for the child.[38] Holtzman's claim did not fit within either of these provisions.[39] Yet, the state's highest court concluded, she had standing to seek visitation with the child.[40] Taken together, the statutes governing custody and visitation showed the "continuing legislative concern with identifying the triggering events that warrant state interference in an otherwise protected parent-child relationship."[41] The court went on to recognize an equitable right for Holtzman to seek visitation based on her functional parent-child relationship, notwithstanding the inapplicability of various custody and visitation statutes to her situation.[42] Knott argued that any recognition of the relationship between Holtzman and the child over Knott's objection would violate her constitutional parental rights.[43] But the court observed that those rights are not absolute; state public policy "directs the court to respect and protect parental autonomy and at the same time to serve the best interest of the child."[44]

In this type of case, the balance was struck by allowing a court to hear a petition for visitation when "it determines that the petitioner has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent."[45] The parent-like relationship is established through four elements: (1) consent by the biological parent to foster the formation of the parent-child relationship; (2) living in the same household with the child; (3) assuming the obligations of parenthood, including support and

34. *Id.* at 422.
35. *Id.*
36. *Id.*
37. WIS. STAT. ANN. § 767.41(1)(b) (West 2011).
38. *Id.* at § 767.41(3).
39. *In re H.S.H.-K*, 533 N.W.2d at 424.
40. *Id.* at 435.
41. *Id.* at 427.
42. *Id.* at 435-36.
43. *Id.* at 434.
44. *Id.* at 435.
45. *Id.* at 421. The scope and source of federal constitutional protection for parental rights is summarized *supra* text accompanying notes 170-181.

childrearing; and (4) sufficient duration to establish "with the child a bonded, dependent relationship parental in nature."[46] The triggering event, in turn, must be established with proof that the biological parent interfered with the petitioner's parent-like relationship and that the petitioner sought court-ordered visitation "within a reasonable time."[47] Once established, the de facto parent must also show that visitation is in the child's best interests.[48] Holtzman's petition for visitation was remanded for application of these tests—was she a de facto parent, was a triggering event sufficient to justify state intervention, and would visitation be in the best interests of the child?

The four-part test established in this case has become the standard one adopted by courts in several other states to determine whether a parent-like relationship exists.[49] And whether or not they follow the exact standard from *H.S.H.-K*, a few legislatures have provided for this quasi-parental status by statute.[50] These states still vary in defining the rights that come with de facto parent status, but they agree that a lesbian co-parent who qualifies could gain at least visitation rights, if not full parental rights, based on the existence of a functional parent-child relationship.[51]

Recognition of de facto parentage, however, is far from universal. Several states have rejected it outright.[52] Their chief concern is intruding on the rights of the biological mother, in violation of her constitutionally protected parental rights.[53] Courts also cite the lack of certainty about

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46. *Id.*

47. *Id.* at 436.

48. *See id.* at 421 (focusing on the best interests of the child as a means to protect the child from turmoil and hostility during the dissolution of a non-traditional adult relationship).

49. *See, e.g.*, *In re* E.L.M.C., 100 P.3d 546, 559-60 (Colo. Ct. App. 2004); Rubano v. DiCenzo, 759 A.2d 959, 974 (R.I. 2000).

50. *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-101 (2011) (considering marriage between persons of the same gender to be void but recognizing children of these marriages as legitimate); *see also* Smith v. Guest, 16 A.3d 920, 925, 930-32 (Del. 2011) (upholding de facto parentage statute against constitutional challenge and awarding joint custody to adoptive mother and lesbian de facto parent).

51. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 176-77 (Wash. 2005) (recognizing de facto parent status in legal parity with an otherwise legal parent).

52. *See, e.g.*, Guardianship of Z.C.W. and K.G.W., 84 Cal. Rptr. 2d 48, 49-50 (Ct. App. 1999); Smith v. Gordon, 968 A.2d 1, 2-3 (Del. 2009), *superseded by statute* DEL. CODE ANN. tit. 13, § 8-101; Wakeman v. Dixon, 921 So. 2d 669, 673 (Fla. Dist. Ct. App. 2006); Matter of Visitation with C.B.L., 723 N.E.2d 316, 320-21 (Ill. App. 1999); B.F. v. T.D., 194 S.W.3d 310, 312 (Ky. 2006); Janice M. v. Margaret K., 948 A.2d 73, 74-75, 81 (Md. 2008); White v. White, 293 S.W.3d 1, 9, 11 (Mo. Ct. App. 2009); Debra H. v. Janice R., 930 N.E.2d 184, 186 (N.Y. 2010); *In re* Thompson, 11 S.W.3d 913, 923 (Tenn. Ct. App. 2000); Jones v. Barlow, 154 P.3d 808, 809-10 (Utah 2007); Stadter v. Siperko, 661 S.E.2d 494, 499-501 (Va. Ct. App. 2008); Titchenal v. Dexter, 693 A.2d 682, 683-85 (Vt. 1997).

53. *See, e.g.*, Black v. Simms, 12 So. 3d 1140, 1143 (La. Ct. App. 2009) (rejecting de facto parentage in light of "the paramount right of a parent in the care, custody, and control of his or [sic] child" that can be abrogated only "in rare circumstances"); *Janice*

parental status as a reason to reject de facto parentage,[54] and the lack of statutory authority to create a quasi-parental status not obviously provided for by the legislature.[55]

New York's highest court has twice rejected de facto parentage, in cases that were nineteen years apart and came at very different points in the gay rights revolution. In 1991, in *Alison D. v. Virginia M.*, the New York Court of Appeals held that only a child's biological or adoptive parent could seek visitation against the wishes of a fit custodial parent.[56] It specifically rejected an argument for any sort of recognition for functional parents—those who participate in crucial aspects of parenting without the benefit of a formal tie to the child.[57] The court in *Alison D.* was interpreting Section 70 of the New York Domestic Relations Law, which allows "either parent" to petition for custody or visitation, the determination of which is to be based on "what is for the best interest of the child, and what will best promote its welfare and happiness . . . ."[58] Grandparents or siblings can seek visitation under separate provisions, which narrowly define the circumstances under which such visitation could be granted over the objection of a parent.[59] But the statute does not define "parent."[60] In

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M., 948 A.2d at 680-95 (finding no justification for elevating de facto parent above other third parties seeking to obtain custody or visitation over the natural parent's objection); *In re Thompson*, 11 S.W.3d at 918-19; *Jones*, 154 P.3d at 819 (refusing to recognize de facto parentage because doing so "would abrogate a portion of [the biological mother's] parental rights"); *Titchenal*, 693 A.2d at 687 (noting the "potential dangers of forcing parents to defend third-party visitation claims").

54. *See infra* text accompanying notes 98-100; *see also, e.g.*, *Debra H.*, 930 N.E.2d at 190-92; *Jones*, 154 P.3d at 816 (declining to adopt de facto parentage doctrine because it "fails to provide an identifiable jurisdictional test that may be easily and uniformly applied in all cases").

55. *See, e.g.*, *Z.C.W.*, 84 Cal. Rptr. 2d at 50-51; *Jones*, 154 P.3d at 810 ("We decline to extend the common law doctrine of in loco parentis to create standing where it does not arise by statute."); *Titchenal*, 693 A.2d at 689 ("Given the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem.").

56. 572 N.E.2d 27, 28 (N.Y. 1991) (finding a woman with a live-in relationship with the child's mother not a "parent" within the statutory meaning).

57. *See id.* at 28-29 (recognizing that the legislature grants standing to certain third parties such as grandparents and siblings to seek visitation and concluding that the legislature did not confer standing to de-facto nonparent).

58. N.Y. DOM. REL. § 70 (McKinney 2011).

59. *Id.* §§ 71, 72. Third-party visitation statutes have fallen under closer judicial scrutiny since the Supreme Court's ruling in *Troxel v. Granville*, in which it held that Washington state's visitation statute was unconstitutional as applied to a widowed mother by allowing paternal grandparent visitation over her objection. *See* 530 U.S. 57, 66 (2000). The New York provision for grandparent visitation was upheld against a *Troxel* challenge in *E.S. v. P.D.*, 8 N.Y. 3d 150 (2007). There, the Court of Appeals held that the statute was constitutional on its face and as applied because it only allowed grandparents to petition for visitation if one or both of the parents were deceased or "where circumstances show that conditions exist which equity would see fit to intervene . . . ." *Id.* at 156. This threshold showing effectively creates a presumption against visitation over a parent's objection, which constitutes sufficient

Alison D., two women, who were living together, decided that one of them would try to conceive a child through artificial insemination.[61] Virginia M. gave birth to a child, and she and Alison D. shared all parenting responsibilities for the first two years of the child's life.[62] After they separated, Virginia allowed visitation for a time, but she eventually stopped contact between Alison and the child.[63] Alison then sued to be recognized as the child's parent, characterizing herself as a "de facto parent" or, alternatively, as a "parent by estoppel."[64] Although Alison did not give birth to the child, she participated in every other respect in planning for the child's conception and in parenting.[65] She did not adopt the child, but at the time, it was not clearly established under New York law that a lesbian co-parent could adopt her partner's child, an issue that was later resolved in favor of co-parent adoption.[66]

In *Alison D.*, the New York Court of Appeals took a very strict view of parentage, noting that "[t]raditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in some situations where the non-parent has exercised some control over the child with the parents' consent."[67] Alison, in the court's view, was simply a non-parent seeking to displace a fit parent's decision about her child's best interests.[68]

Almost twenty years later, the New York Court of Appeals was asked to reconsider its ruling in *Alison D.* by another lesbian co-parent, in *Debra H. v. Janice R.*, the case highlighted in this symposium. The world had changed dramatically during that time for lesbian and gay families. Same-sex marriage became legal in some states, and marriage-like statuses emerged in several others. Gay and lesbian parents gained greater judicial and legislative protection for the parent-child relationships they had formed functionally—including greater recognition of second-parent adoption, joint adoption by unmarried (including same-sex) couples, as well as by the

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deference to parental rights under *Troxel*.

60. *See* N.Y. DOM. REL. § 70.

61. *Alison D.*, 572 N.E.2d at 28.

62. *Id.*

63. *Id.*

64. *Id.* at 28-29.

65. *Id.* at 28.

66. *See In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995) (holding that lesbian and unmarried heterosexual partners have standing to become adoptive parents).

67. *Alison D.*, 572 N.E.2d at 29.

68. *Id.* The Supreme Court would later make clear that a fit parent must constitutionally be presumed to act in the child's best interest. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000). A court's decision to override a fit parent's decision, thus, must be predicated on "special weight" to the parent's determination of the child's best interests. *Id.* at 69.

doctrines of de facto parentage and intended parentage. Thus, Debra was, in important ways, posing a different question to the New York court about her parental rights. But, as discussed below, she received the same answer: New York does not recognize de facto parentage.

In November 2003, a pregnant Janice R. entered into a civil union with Debra H., a woman with whom she had an intimate relationship.[69] In December 2003, Janice gave birth to a son, M.R.[70] While New York now allows second-parent adoption for gay and lesbian co-parents,[71] Janice "repeatedly rebuffed" Debra's requests to adopt M.R.[72] Nonetheless, the two women co-parented the boy from his birth until they separated in 2006.[73] After the separation, with Janice's consent, Debra had in-person visitation with M.R. three times a week and telephone contact every day.[74] In 2008, however, Janice began restricting Debra's visitation time, and eventually cut off all contact.[75] In May 2008, Debra filed a petition seeking joint physical and legal custody of M.R.[76] Pending resolution of Debra's claim, Janice agreed to reinstate the three-day-a-week visitation schedule they had used earlier, as long as a nanny or other third party accompanied M.R. on his visits with Debra.[77]

Debra's petition was premised on two alternative theories. First, she claimed that Janice was equitably "estopped" from denying that Debra was also a parent to M.R. given her consent to Debra's functional role in the child's life.[78] In other words, Debra contended that because Janice had acted as if Debra had a parental right to see M.R.—and Debra had in fact functioned as a parent—Janice was now bound to recognize that right by allowing shared custody or visitation.[79] Second, Debra claimed that she was entitled to "legal parent" status by virtue of the couple's Vermont civil union, which carries with it all the legal rights and obligations of marriage.[80] Ultimately, the state's highest court rejected the first argument, but accepted the second.[81]

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69. Debra H. v. Janice R., 930 N.E.2d 184, 186 (N.Y. 2010).

70. *Id.*

71. *See, e.g.*, *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995).

72. *Debra H.*, 930 N.E.2d at 186.

73. *Id.* at 186-88. The nature and extent of Debra's parenting role is a disputed fact that was left for resolution on remand. *Id.* at 197.

74. *Id.* at 186.

75. *Id.*

76. *Id.*

77. *Id.* at 186-87.

78. *Id.*

79. *See id.* at 186 (noting that when the parties first separated, they had established a set visitation schedule).

80. *Id.* at 195.

81. *Id.* at 194, 197.

The trial court had agreed only with Debra's first argument, concluding that she had established a prima facie case to invoke equitable estoppel as a means to secure visitation and custody rights.[82] That court then ordered another hearing to sort out the facts relating to this question: Did Debra in fact function as a parent, such that she possessed the rights that come with that status?[83]

Before that hearing could take place, however, Janice appealed the court's ruling that equitable estoppel could be invoked in this context—and the appellate court agreed that the ruling had been in error.[84] In an April 2009 ruling, the Appellate Division unanimously vacated the trial court's order, concluding that Debra could not seek visitation or custody under New York law because, despite serving "as a loving and caring parental figure during the first 2 1/2 years of the child's life," New York law does not recognize the parental rights of any adult other than a legal, biological, or adoptive parent.[85]

The basic question, as in similar cases, is whether Debra is M.R.'s parent? This is not merely a factual question, but a legal one: Does Debra meet any of the law's criteria for "legal parent" status? Under New York law, a woman is clearly entitled to legal-mother status if she gives birth to a child or has legally adopted him.[86] As discussed below, the court ultimately recognized Debra H. as a legal parent by virtue of her civil union to the biological mother, but it refused to recognize her as a de facto parent, based on her functional role in raising the child.[87]

The state's highest court rejected the de facto parentage doctrine as a means to extend parental or quasi-parental rights to anyone other than a legal, biological, or adoptive parent.[88] Three judges concurred in the result, but did not agree with reaffirming the *Alison D.* holding.[89] Judges Ciparick and Lippman concluded that *Alison D.* should be overruled.[90] Judge Smith would not have adopted the de facto parentage doctrine as it was proposed, but urged instead a narrower doctrine—one that would grant parentage to

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82. Debra H. v. Janice R., No. 106569/08, 2008 WL 7675822, at *16 (N.Y. Sup. Ct. Oct. 2, 2008) (finding the civil union argument relevant to, but not dispositive of, the question of parental rights), *rev'd* 877 N.Y.S.2d 259 (App. Div. 2009), *rev'd* 930 N.E.2d 184 (N.Y. 2010).

83. *Id.* at *17.

84. *See* Debra H. v. Janice R., 877 N.Y.S.2d 259, 260 (App. Div. 2009), *rev'd* 930 N.E.2d 184 (N.Y. 2010).

85. *Id.*

86. *Cf.* N.Y. DOM. REL. § 124 (McKinney 2011) (providing that a birth mother's participation in a surrogacy agreement has no adverse effect on her parental rights, status, or obligations).

87. Debra H. v. Janice R., 930 N.E.2d 184, 189, 193-94 (N.Y. 2010).

88. *See id.* at 194.

89. *Id.* at 201, 203, 206.

90. *Id.* at 201, 206.

an adult for a child who was conceived through anonymous donor insemination by one member of a same-sex couple, then living together, with the knowledge and consent of the other.[91]

In seeking to have the *Debra H.* court overturn *Alison D.*, Debra argued that the court had implicitly departed from the hard line it took in *Shondel J. v. Mark D.*[92] In that case, the New York Court of Appeals found a man who held himself out as a child's biological father for four and a half years liable for child support, even though DNA tests proved he was not genetically related to the child.[93] The court relied on the concept of paternity by estoppel to prevent the man from avoiding child support obligations.[94]

> A man who harbors doubts about his biological paternity of a child has a choice to make. He may either put the doubts aside and initiate a parental relationship with the child, or insist on a scientific test of paternity *before* initiating a parental relationship.... It is not an easy choice, but at times, the law intersects with the province of personal relationships and some strain is inevitable. This should not be allowed to distract the Family Court from its principal purpose in paternity and support proceedings—to serve the best interests of the child.[95]

Is it inconsistent for the court to use estoppel principles to determine parentage for child support purposes, but not for purposes of allowing custody or visitation? The court in *Debra H.* said no. It pointed to a difference in the language of the statute governing child support versus the one governing parental custody—the former specifically directs courts to consider "equitable estoppel" before deciding whether to order paternity testing, while the latter does not mention the concept.[96] However, the real explanation is that courts often take a broader approach to defining parentage in the child support context, than in the custody/visitation context, for fear of depriving a child of necessary support, particularly where the child is already financially dependent on the parent.

The court in *Debra H.* defended its affirmation of *Alison D.* based on one primary goal: "promot[ing] certainty in the wake of domestic breakups."[97] It sought to avoid "disruptive battles over parentage as a prelude to further potential combat over custody and visitation" and hearings that "are likely often to be contentious, costly, and lengthy."[98] This singular emphasis on

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91. *Id.* at 203-05.
92. *Id.* at 190; Shondel J. v. Mark D, 853 N.E.2d 610 (N.Y. 2006).
93. *See Shondel J.*, 853 N.E.2d at 612-13.
94. *See id.* at 615-17.
95. *Id.* at 617.
96. *Debra H.*, 930 N.E.2d at 190-91.
97. *Id.* at 191.
98. *Id.* at 191-92.

certainty blinded the court to other relevant concerns, as well as to the perhaps unintended consequences of a bright-line rule.[99]

Indeed, the bright-line rule of *Alison D.* does clarify parental rights in most cases without the need for litigation. But whether predictability is the most important goal when considering parentage of a child was a question left unanswered. As Section III suggests, the certainty may come at the expense of the welfare of children who sometimes develop strong relationships with adults who do not fit the clearly demarcated role of "legal parent." There are, after all, consequences to applying bright-line rules like the one that was reaffirmed in *Debra H.* De facto parents lose the children they have been raising—and, in many instances today, whom they intended to parent prior to conception, and the children lose an adult with whom they shared a functional parent-child relationship. This latter consequence is especially troubling given the law's commitment, in the custody context, to continuity of care for children.

C. Parentage Through Marital Status: The "New Illegitimacy"

Despite the adverse holding on de facto parentage, Debra H. was, in the end, granted "legal parent" status vis-à-vis M.R.[100] The New York Court of Appeals ruled that because Debra and Janice had entered into a Vermont civil union before M.R. was born, Debra was his legal parent.[101] While this ruling is ultimately supportive of lesbian co-parenting rights, it is narrowly drawn to recognize such rights only when the couple involved is part of a formal, recognized relationship such as a civil union or a same-sex marriage. It thus reinvigorates the waning tie between legitimacy and parentage in the context of lesbian co-parents—a tie that, as described above, has waned in other contexts. Under this ruling, a legitimate child of lesbian co-parents has two legal parents, while an "illegitimate" child, in the absence of a second-parent adoption, has only one.[102]

Why did the civil union between Debra and Janice come with parental rights? The New York Court of Appeals recognized Debra's parental status out of respect for Vermont's laws, which recognize that civil union partners are presumptively the parents of children born during the union to either partner—just as men are presumptively the parents of children born

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99. *See, e.g.*, Carlos Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Facade of Certainty*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 623 (2012); Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 721 (2012).

100. *Debra H.*, 930 N.E.2d at 200.

101. *Id.* at 197.

102. *See id.* at 200, 204 (Smith, J., concurring) (arguing for a special status to avoid rendering children of same-sex couples illegitimate).

to their wives during a marriage.[103] This ruling required two steps—first, the court had to make a finding as to what Vermont law says regarding the effects of a civil union on parentage; and, second, the court had to decide whether Vermont's law should be given effect in New York.[104]

Although Vermont now offers full marriage equality to same-sex couples,[105] its legislature broke new ground in 2000 when it adopted civil unions for same-sex couples, a legal status that was identical to marriage in all respects other than name.[106] The enacting statute provided that parties to a civil union shall have "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage," including the enjoyment of the same rights "with respect to a child of whom either becomes the natural parent during the term of a civil union."[107]

This provision was tested in a 2006 case, *Miller-Jenkins v. Miller-Jenkins*.[108] In that case, a lesbian couple entered into a civil union and then together planned for one of them to become pregnant via artificial insemination.[109] Although one partner, Lisa, was the biological mother, both women were involved in every aspect of the conception, birth, and early rearing of the child, IMJ.[110] Thirteen months after the child's birth, however, Lisa took the child and fled to Virginia, a state that is notoriously hostile to same-sex couples.[111] (The biological mother herself became hostile to them after becoming a born-again Christian and declaring homosexuality a sin from which she intended to shield her daughter.) Lisa filed a petition in Vermont family court to dissolve her civil union with Janet.[112] In her complaint, she "listed IMJ as the 'biological or adoptive child[] of the civil union'" and requested an order on custody and visitation.[113] The family court issued a temporary order, ruling that IMJ

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103. *See id.* at 195 (noting that Vermont's statute accords the same benefits, protections and responsibilities to parties in a civil union as spouses in a marriage).

104. *Id.* at 194.

105. An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, S.B. 115, 2009-2010 Leg. (Vt. 2009).

106. Spurred by a ruling of the state's highest court that denying same-sex couples the benefits of marriage was a violation of the state constitution's Common Benefits Clause, the legislature passed a law to create the civil union. *See* Baker v. State, 744 A.2d 864 (Vt. 1999); *see also* An Act to Create Civil Unions, VT. STAT. ANN. tit. 15, § 1201-05 (2000) (partially repealed 2009). Per the Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, *supra* note 105, new civil unions can no longer be created in Vermont, but existing ones will continue to be recognized. *Id.*

107. VT. STAT. ANN. tit. 15, § 1204(a), (f) (2012).

108. Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006).

109. *Id.* at 956.

110. *Id.* at 970.

111. *Id.* at 956.

112. *Id.*

113. *Id.* at 951.

had two legal mothers and awarding primary custodial rights to Lisa and "parent-child contact" both in person and over the phone to Janet.[114] Lisa permitted only one in-person visitation before cutting off all contact between Janet and IMJ.[115] She then successfully sought an order from a Virginia county court denying Janet's parentage.[116] The case was a procedural (and personal) nightmare, with many steps, in what turned into an interstate parental rights dispute. Ultimately, however, the Vermont Supreme Court affirmed Janet's parentage of IMJ, and the Virginia Supreme Court deferred to the ruling under principles of full faith and credit.[117]

Why was Janet entitled to visitation with IMJ? The Vermont Supreme Court gave two reasons. First, it applied the *in loco parentis* doctrine—similar to the de facto parentage doctrine in other states—which allows a court to order custody or visitation to an adult like a stepparent who has acted as a parent when extraordinary circumstances justify such an order.[118] Janet was entitled at least to visitation under this doctrine. Second, the court ruled that Janet had full status as a parent to IMJ.[119] The court did not, however, base its ruling on the marital presumption of parentage.[120] As mentioned above, the civil union legislation promises that civil union partners shall have the same rights as spouses with respect to "a child of whom either becomes the natural parent during the term of the civil union."[121] The rights of married couples in this respect are governed by another statute, the Parentage Proceedings Act, which provides, "[a] person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if . . . the child is born while the husband and wife are legally married to each other."[122] Although one could argue that this marital presumption applies with equal force to a lesbian civil union couple, if the lack of a biological connection is sufficient to rebut the presumption, then it is ultimately of little use. The Vermont Supreme Court ruled that this latter

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114. *Id.*

115. *Id.*

116. *Id.* at 956-57.

117. *Id.* at 965, 972-73. The case continues to this day because, although the legal rights of Lisa and Janet with respect to IMJ have been finally determined, Lisa took IMJ and disappeared in violation of the custody order. The search for her is ongoing. *See* Criminal Complaint, United States v. Timothy Miller, No. 2:11-mj-28-1 (D. Vt. 2011) [hereinafter Criminal Complaint], *available at* http://www.glad.org/uploads/docs/cases/miller-jenkins-v-miller-jenkins/miller-jenkins-criminal-complaint.pdf (noting that both Lisa and her brother, Timothy Miller, were charged with crimes related to IMJ's disappearance).

118. *Miller-Jenkins*, 912 A.2d at 967.

119. *Id.* at 969-70.

120. *Id.* at 970-71.

121. VT. STAT. ANN. tit. 15, § 1204(f) (2012).

122. *Id.* § 308.

section was irrelevant in *Miller-Jenkins*; instead, it looked directly at the facts relevant to parentage under Vermont law and concluded:

> Many factors are present here that support a conclusion that Janet is a parent, including, first and foremost, that Janet and Lisa were in a valid legal union at the time of the child's birth. The other factors include the following. It was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition. Finally, there is no other claimant to the status of parent, and, as a result, a negative decision would leave IMJ with only one parent. The sperm donor was anonymous and is making no claim to be IMJ's parent. If Janet had been Lisa's husband, these factors would make Janet the parent of the child born from the artificial insemination. Because of the equality of treatment of partners in civil unions, the same result applies to Lisa.[123]

The court drew on the large number of decisions finding husbands to be the legal fathers of their wives' children, even when the children were conceived with donor sperm.[124] The reasons vary, but the end result is almost always the same: a co-parent who intends to become the legal parent of a child conceived via artificial insemination with donor sperm is a legal parent. In the Vermont court's view, this was "not a close case," in part because the "couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage."[125] The perceived benefits of legitimacy were clearly important to the court in focusing so heavily on the couple's status vis-à-vis each other.

Recall that the New York court in *Debra H.* undertook to understand and apply Vermont's parentage law, as explicated in *Miller-Jenkins*. The New York court cited Vermont's statutes providing, respectively, for a marital presumption of paternity and for equal treatment for civil union couples and observed that:

> [i]n *Miller-Jenkins*, the Vermont Supreme Court relied upon these provisions to hold that a child born by artificial insemination to one partner of a civil union should be deemed the other partner's child under Vermont law for purposes of determining custodial rights following the civil union's dissolution. The court concluded that in the context of marriage, a child born by artificial insemination was deemed the child of the husband even absent a biological connection. In light of section 1204 and by parity of reasoning, the court decided that the same result

123. *Miller-Jenkins*, 912 A.2d at 970.
124. *Id.*
125. *Id.* at 971.

> pertained to the partner in the civil union with no biological connection to the child.[126]

As Nancy Polikoff and Carlos Ball persuasively argue, the New York Court of Appeals clearly misconstrued the holding and reasoning in *Miller-Jenkins*.[127] Parentage was not assigned to Janet based solely on the civil union; in fact, the court expressly rejected that approach and looked instead at a variety of factors.[128]

In *Debra H.*, Janice also argued that *Miller-Jenkins* should not apply because, in that case, the child was *conceived* after the civil union was established, whereas M.R. was *born* after Debra's and Janice's civil union ceremony but *conceived* before it took place.[129] But, the New York court held that, under Vermont law, this distinction was irrelevant, because the *Miller-Jenkins* court had emphasized several times that its finding of joint parentage was premised on the fact that the child was born after the couple became legal partners regardless of the timing of conception.[130] Indeed, the New York court noted, "entering into the civil union at a time when both partners know that one of them is pregnant by artificial insemination might well be viewed as presenting an even stronger case than *Miller-Jenkins* to support the nonbiological partner's parentage [and] [t]here is certainly no potential for misunderstanding, ignorance or deceit under such circumstances."[131] Janice also argued that the civil union was "of utterly no consequence" to her and that she acquiesced only to avoid further nagging by Debra.[132] But the court was unpersuaded that this, even if true, should matter. Regardless of her "motivation or expectation," Janice "chose to travel to Vermont to enter into a civil union," and this, because of *Miller-Jenkins*, turned Debra into a legal parent of Janice's biological child.[133]

But the conclusion that Vermont law would likely recognize Debra as M.R.'s legal parent because of the civil union—correct or not—is not dispositive. A New York court still has the choice whether to give effect to Vermont law, when its own laws are different or in conflict. Courts generally are forced to recognize adoption orders from other states because legal *judgments* are subject to the most exacting form of "full faith and credit"—the requirement that each state honor legal acts and judgments from sister states. But the question whether to honor another state's law, as opposed to another state's court's order or judgment, is subject to much

126. Debra H. v. Janice R., 930 N.E.2d 184, 195 (N.Y. 2010).
127. *See supra* note 99.
128. *See id.*
129. *Debra H.*, 930 N.E.2d at 195.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 196.

less exacting standards.[134] When "asked to apply the law of a sister state," states need only observe "certain minimum requirements."[135] A state can choose not to defer to another state's law as long as it has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[136] Thus, the decision to defer, for example, to another state's parentage laws is an exercise of comity—respect for sister states—not a constitutional obligation.

In *Debra H.*, the court opted to rely expressly on this notion of "comity" to defer to Vermont's parentage rules.[137] It found no evidence in New York law of a public policy that is opposed to the recognition of same-sex co-parents—indeed, it found the state's law was entirely consistent with broad recognition of parental rights for same-sex couples.[138] Although the New York legislature has since passed a law legalizing same-sex marriage, it had not yet done so when *Debra H.* was decided.[139] New York permits one person to adopt the children of a same-sex partner, and permits same-sex couples to jointly adopt children.[140] Consequently, the court reasoned that an exercise of comity would not "undermine the certainty that *Alison D.* promises biological and adoptive parents and their children: whether there has been a civil union in Vermont is as determinable as whether there

134. Wells v. Simonds Abrasive Co., 345 U.S. 514, 516 (1953).

135. *Id.*

136. Phillips Petroleum v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)); *see also* Williams v. North Carolina, 317 U.S. 287, 294-98, n.6 (1942) (stating that principles of full faith and credit do "not require one state to substitute for its own statute . . . the conflicting statutes of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events" (quoting Pacific Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502 (1939))).

137. One irony of the court's ruling on this point is its contrast with the way in which New York has treated Vermont civil unions in other contexts. In a highly-publicized case, *Langan v. St. Vincent's Hospital*, New York's Appellate Division refused to allow a man to pursue a wrongful death action for the loss of his same-sex partner through alleged medical malpractice. 802 N.Y.S.2d 476 (App. Div. 2005). Although the men had entered into a civil union in Vermont, the court ruled there that a civil union partner is not a "spouse" for purposes of New York's wrongful death law, which only allows next-of-kin to sue. *Id.* If the court had deferred to Vermont law under principles of comity in that case—which the trial court in the same case had done—then the outcome would clearly have been different. Vermont law grants all the benefits of marriage to civil union partners, and one of those benefits is standing to sue for wrongful death. Yet, the New York court dismissed the request for comity out of hand and gave no attention to New York's long history of recognizing prohibited marriages from out of state. *Id.* It may be that the court has good reasons for giving effect to a civil union for one purpose and not another, but the burden is on the court to explain any distinction it draws and, thus far, it has not persuasively done so.

138. *Debra H.*, 930 N.E.2d at 196-97.

139. N.Y. DOM. REL. LAW §§ 10-a, 10-b (McKinney 2011).

140. *See, e.g.*, *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995).

has been a second-parent adoption."[141] It would thus "not lead to protracted litigation over standing and is consistent with New York's public policy by affording predictability to parents and children alike."[142]

Accordingly, because Debra would have been considered a legal parent in Vermont, as the court held, she is entitled to that same status in New York—a status that entitled her to seek visitation and custody at a best-interests-of-the-child hearing under section 70.[143] Although the outcome of such a hearing is not foreordained, there is a strong presumption that fit parents should be afforded at least some parenting time with their children.

While Vermont's law on parentage for same-sex spouses is not as clear as the New York court would have us believe, it is supportive of the idea that parentage of each other's children is a natural consequence of marriage—or civil union. A similar approach seems to be taken in most of the states that permit same-sex couples to marry or attain some equivalent status. California's domestic partnership law, for example, provides that the "rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."[144] And the law separately provides that a husband is the presumed father of a child born to his wife.[145] By implication, then, a woman can be the presumed (second) legal mother of a child born to her female domestic partner. New Jersey and Illinois follow a similar approach for civil union partners,[146] as does Nevada for domestic partners.[147] The same argument can be made in most of the full marriage equality states, since they generally provide that same-sex spouses are subject to all the rights and obligations of opposite-sex spouses.[148]

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141. *Debra H.*, 930 N.E.2d at 196.

142. *Id.* at 197.

143. *Id.* at 200.

144. CAL. FAM. CODE § 297.5(d) (West 2012); *see also* D.C. CODE § 16-909(a-1)(1) (West 2012).

145. CAL. FAM. CODE § 7611(a).

146. *See* N.J. STAT. ANN. § 37:1-31 (West 2012) (providing that the "rights of civil union couples with respect to a child of whom either becomes the parent during the term of the civil union, shall be the same as those of a married couple with respect to a child of whom either spouse or partner in a civil union couple becomes the parent during the marriage"); *Id.* § 9:17-43 (providing that a man is "presumed to be the biological father of a child if . . . (1) [h]e and the child's biological mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce"); *Id.* § 9:17-44 (providing that a married woman's husband is "treated in law as if he were the natural father of a child thereby conceived" if the wife conceives a child with donor sperm, under the supervision of a physician and with the consent of her husband); *see also* 410 ILL. COMP. STAT. ANN. 535/12 (West 2012); 750 ILL. COMP. STAT. ANN. 5/212, 5/303, 40/2, 40/3, 45/5.

147. *See* NEV. REV. STAT. ANN. § 122A.200(d) (West 2012).

148. *See, e.g.*, WASH. S.B. 6239, at § 1(3) (effective June 1, 2012) ("Where necessary to implement the rights and responsibilities of spouses under law, gender specific terms

These regimes lay the groundwork for lesbian co-parentage by virtue of marital status, but no statute is foolproof. After all, if the statutes provide that same-sex spouses are entitled to the same rights and benefits as opposite-sex ones, and the marital presumption of paternity is rebuttable through evidence of a lack of a biological connection, how strong is the right of joint parentage? The one thing we know about the lesbian co-parent is that she is *not* the child's biological mother.

The D.C. Code anticipates this problem and treats the question of lesbian co-parentage more explicitly. It provides that there is "a presumption that a woman is the mother of a child if she and the child's mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception or birth, and the child is born during the marriage or domestic partnership, or within 300 days after termination of marital cohabitation . . . or the domestic partnership . . . ."[149] This presumption can be rebutted with "clear and convincing evidence that the presumed parent did not hold herself out as a parent of the child."[150]

Although the approaches vary by jurisdiction and are often ambiguous, there is no question that the general trend is towards recognition that marital status creates at least a presumption of joint parentage for same-sex couples. The same is true for children of opposite-sex, married parents. The difference—the "new illegitimacy"—lies in what happens when there is no marriage. Does marriage become the exclusive way for same-sex co-parents to establish parentage? Is one penalty for "illegitimacy" the lack of a second legal parent? This is a surprising result given the more general trend toward disentangling legitimacy and parentage, which is the subject of the next section.

II. THE DISENTANGLEMENT OF LEGITIMACY AND PARENTAGE: SOME LESSONS FROM THE LAW OF UNWED FATHERHOOD

Joan and Peter Stanley raised three children together and cohabited on and off for almost two decades, but they never married.[151] When Joan died in the late 1960s, the children were made wards of the state and placed with a court-appointed guardian.[152] Peter, although he was the biological and social/psychological father of the children, and supported them throughout their lives, was given no rights as a legal parent under Illinois law.[153] In

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such as husband and wife used in any statute, rule, or other law must be construed to be gender neutral and applicable to spouses of the same sex.").

149. D.C. CODE § 16-909(a)(1).

150. *Id.* § 16-909(b)(2).

151. *In re* Stanley, 256 N.E.2d 814, 814 (Ill. 1970).

152. *Id.*

153. *Id.*

fact, the law did not include him in the definition of parent at all; under the Juvenile Court Act, "'Parents' means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent. It does not include a parent whose rights in respect of the minor have been terminated in any manner provided by law."[154] Because Peter was not considered a "parent," his children's fate upon the death of their mother—and only legal parent—was governed by another provision, which rendered them "dependent" on the state because they were "without a parent, guardian, or legal custodian."[155] He could have petitioned to be their custodian or guardian but, even if appointed, he would not have been considered their "parent," with all the rights and obligations that come with that status.

The Illinois law that denied legal parent status to Peter Stanley was not an anomaly. It was part and parcel of a legal system that, by and large, tied parentage to legitimacy. For legitimate children, the mother's husband was presumed, often conclusively, to be the legal father.[156] Marital status of the mother thus determined paternal parentage of the child.[157]

For illegitimate children, marital status often determined (or precluded) parentage as well. Although American law never took as harsh an approach to the status of illegitimate children as English law, most state laws differentiated between legitimate and illegitimate children when defining the parent-child relationship.[158] Into the nineteenth century, a child born out of wedlock was *filius nullius*—the child of nobody.[159] But, this rule was often overlooked to allow ties between illegitimate children and their mothers and her kin. The formal rule gave way by the end of the nineteenth century to a less harsh rule that rendered them, by law, children of their mothers, but not their fathers.[160] Like the 1967 version of the Illinois Juvenile Court Act, most state statutes in the late nineteenth and early twentieth century defined "parent" to include both mother and father

154. ILL. REV. STAT. ch. 37, para. 701-14 (1967) (current version at 705 ILL. COMP. STAT. ANN. 405/1-3 (West 2012) (removing the word legitimate)). The provisions applicable to this case are cited and discussed in the opinion of the Illinois Supreme Court. *See In re* Stanley, 256 N.E.2d 814, 815 (Ill. 1970).

155. ILL. REV. STAT. ch. 37, para. 702-05 (1967) (current version at 705 ILL. COMP. STAT. ANN. 405/2-4 (West 2012)).

156. *See* LESLIE HARRIS ET AL., FAMILY LAW 887 (4th ed. 2010) (stating that in England, a husband was conclusively presumed to be the father of his wife's children, unless he had been out of the kingdom for more than nine months).

157. *See* Michael H. v. Gerald D., 491 U.S. 110, 120 (1989) (describing and upholding conclusive marital presumption of paternity).

158. *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994).

159. *See id.* at 24.

160. On this history, see John Witte, Jr., *Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC'Y 327, 329-30 (2003).

in the case of legitimate children, but only the mother in the case of illegitimate children. And for "legitimate" children who were actually fathered by someone other than the mother's husband, their biological fathers did not have legal parent status either.

There were obvious reasons to treat legitimacy and parentage as the same question. For the most part, children of married parents were, in fact, sired by the mother's husband. Thus, even a conclusive marital presumption of paternity was tying the right man to the child most of the time.[161] And, in the cases in which that was not true, the sex leading to the pregnancy was clearly verboten and not worthy of legal recognition.[162] The interloping man was not likely to be a source of stability or support, and chasing after him could only damage the reputation of both mother and child; the law thus avoided chasing after him.[163] Moreover, given the limitations of scientific knowledge, the real father could never be known for sure. And the cost of inquiring might be the disruption and dissolution of the otherwise intact family unit.[164]

Even though they were generally not defined as legal "parents," fathers of out of wedlock children were not always legally free of obligation. As states began to formalize the obligation of parents to support their children, many specifically obligated fathers to support illegitimate children. By the 1930s, every state had both a civil and criminal law requiring support for children.[165] These laws varied as to whether mothers were also obligated to support children, and as to whether illegitimate children were included, but a number of states did require fathers to support their out-of-wedlock children.[166] Unwed mothers or local prosecutors could institute "bastardy" proceedings to prove paternity and obtain child support.[167]

However, the financial obligations imposed on unwed biological fathers did not, as a general rule, come with parental rights. It was this bifurcation of the rights and obligations of biological fatherhood that was the subject of several challenges in the 1970s. In *Stanley v. Illinois*, the case challenging

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161. *See* Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in* Privette *and* Daniel *Calls for Statutory Reform*, 26 FLA. ST. U. L. REV. 219, 227-28 (1999) (citing a 1940s study that found ten percent of children born to married women were conceived in adultery).

162. On the law's confinement of legitimate sex to marriage, see generally GROSSMAN & FRIEDMAN, *supra* note 7.

163. *Id.*

164. Even when blood-typing evidence made clear that the husband was not the father of his wife's child, courts were still reluctant to deny his legal parent status. *See, e.g.*, Prochnow v. Prochnow, 80 N.W.2d 278, 281 (Wis. 1957).

165. CHESTER G. VERNIER, AMERICAN FAMILY LAWS, VOLUME IV: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII (TO JAN. 1, 1935) at 5 (1936).

166. *See id.*

167. *See id.*

Illinois's refusal to recognize Peter Stanley as the legal father of his biological children, the U.S. Supreme Court concluded that the law excluding unwed fathers from the definition of "parent" violated the Due Process Clause of the Fourteenth Amendment.[168] The Court relied first on the well-established principle that the right to "conceive and to raise one's children" is "essential."[169]

A series of twentieth century cases had cemented the idea that parental rights had a constitutional basis. In 1923, in *Meyer v. Nebraska*, the Court invalidated a Nebraska law banning instruction in any foreign language before ninth grade.[170] The state had a right to try to "foster a homogeneous people with American ideals," but it was not strong enough to override the parents' right to have their children learn German.[171] Such cultural decisions fell within a sphere of personal and family life that was protected from unnecessary governmental intrusion. The Court's ruling in *Pierce v. Society of Sisters* followed just two years later.[172] Here, the Court invalidated an Oregon law that required children between ages eight and sixteen to attend public school.[173] States could regulate the schools, even the curriculum, but they could not insist that children be educated only in government-run schools.[174] A child was "not the mere creature of the State," and parents possessed the right to make basic educational decisions.[175] In the final piece of the trilogy, in 1944, the Court ruled, in *Prince v. Massachusetts*, that a child's guardian—her aunt—*could* be convicted for allowing her niece to sell religious pamphlets on the street in violation of state labor law.[176] Here, it was the child's rights that were invoked, and they were not sufficiently strong to override the state's interest in restricting child labor.[177]

Despite the relatively early emphasis on parental rights in the arc of constitutional privacy jurisprudence, the Court had never—in the fifty years between *Meyer* and *Stanley*—applied them to unwed fathers. In part, this was a function of demographics because the rate of non-marital childbearing remained minute into the 1950s, and, even then, began to rise only gradually.[178] The illegitimacy rate was estimated at only 1.8% in

168. 405 U.S. 645, 648 (1972).
169. *Id.* at 651 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
170. 262 U.S. 390, 402-03 (1923).
171. *Id.* at 403.
172. 268 U.S. 510 (1925).
173. *Id.* at 534-36.
174. *Id.*
175. *Id.* at 534.
176. 321 U.S. 158, 163 (1944).
177. *Id.*
178. *See* MASON, *supra* note 158, at 70.

1915; and only 3% in 1940.[179] But the tides definitely had turned by the 1980s: in 1985, 22% of all children were born to unmarried mothers; in 1997, 32%; and by 2008, 40.6%.[180] The rate for children of African-American mothers, in 2008, was over 70%.[181]

The strands of cause and effect are hard to discern, but the second half of the twentieth century saw the slow dismantling of a system that refused to acknowledge the legitimacy of sex outside of marriage, or the legitimacy of children that might result from such unions. The developing right of privacy gave individuals control over contraception and abortion, and the Supreme Court explicitly extended such rights to unmarried couples. Non-marital cohabitation began to rise, and, eventually, states caught up to their residents by decriminalizing cohabitation and establishing the possibility of property-sharing rights between cohabitants. Legislators and courts continued to favor and promote sex within marriage, and the birth of children into married families, but the formal efforts to ignore all other family forms began to subside.

Amid this shift toward greater non-marital sex and childbearing, courts were forced to consider the validity of the many state laws that drew blunt, and sometimes harsh, distinctions between marital and non-marital children. The Supreme Court waded into this issue in 1968, in *Levy v. Lousiana*.[182] In that case, a law precluded a deceased mother's five children from collecting damages for her wrongful death because they had been born out of wedlock.[183] The Court struck down the law as a form of invidious discrimination given that "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."[184] Although the Court seemed to backpedal a bit in cases like *Labine v. Vincent*,[185] it ruled in several other cases after *Levy* that states could not wantonly discriminate against illegitimate children.[186] State law classifications on grounds of illegitimacy were entitled to heightened scrutiny at the same level as those based on gender or alienage.[187] But even

179. *Id.*

180. *See* Brady E. Hamilton et al., *Births: Preliminary Data for 2008*, NAT'L VITAL STAT. REP., Apr. 6, 2010, at 1, 6, tbl.1.

181. *Id.*

182. 391 U.S. 68 (1968).

183. *Id.* at 69-70.

184. *Id.* at 72.

185. 401 U.S. 532 (1971).

186. *See, e.g.*, Glona v. Am. Guarantee & Liability Ins. Co., 391 U.S. 73 (1968) (holding that a law that denies mothers of illegitimate children the right to recover for wrongful death violates the equal protection clause of the Constitution); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (invalidating law that denied workmen's compensation recovery rights to unacknowledged illegitimate children was unconstitutional).

187. *Id.* at 74-76.

in those cases where differential treatment was allowed, courts did not question the existence of a legal mother-child relationship—just whether disparate benefits or burdens could be imposed based on the circumstances of a child's birth. Certain financial penalties were viewed as an acceptable method of deterring illegitimate births.

As a consequence of these rulings, states were quite constrained after the 1970s in any attempt to deter non-marital childbearing by punishing either the children or their mothers. Thus, these cases ultimately stood for the proposition that mothers had the same legal relationship to their non-marital children as to their marital children. Once that was established, it became more difficult for the Supreme Court to uphold a system that denied any recognition to biological fathers, merely because they were born out of wedlock. As the majority noted in *Stanley*,

> Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit.[188]

The state does not have unfettered discretion to draw the "legal lines [of parenthood] as it chooses."[189]

With respect to unwed fathers, the Court concluded that the categorical rule of non-recognition actually undermined the state's identified interests.[190] It aimed to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible."[191] Yet, the law allowed children to be cut off from custodial, biological fathers based solely on marital status. As the Court observed in *Stanley*, "the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."[192] Thus, even if the state was right that "most unmarried fathers are unsuitable and neglectful parents," some in this category are "wholly suited to have custody of their children."[193] Peter Stanley, in the Court's view, was entitled to an opportunity to make his case as a father deserving

188. Stanley v. Illinois, 405 U.S. 645 (1972) (internal citations omitted).
189. *Id.* at 652.
190. *Id.*
191. *Id.*
192. *Id.* at 652-53.
193. *Id.* at 654.

of custody.[194] The denial of such an opportunity ran afoul of the emerging protection for illegitimate children, as well as the then-emerging, but now defunct irrebuttable presumption doctrine, which led the Court to strike down a series of laws with similar structure, in a variety of contexts, during the early 1970s.[195] The Court compared Stanley's plight to that of servicemen stationed in Texas who were irrebuttably presumed non-residents for voting purposes and drivers in Georgia who were deprived of a license in some circumstances regardless of fault.[196] In all three cases, the states were engaging in "procedure by presumption," which, while "cheaper and easier than individualized determination," came at the expense of individuals' due process rights. In the case of unwed fathers, the state's reliance on an irrebuttable presumption "needlessly risks running roughshod over the important interests of both parent and child."[197] The Court, thus, invalidated the Illinois statute that categorically denied legal parent status to unwed fathers.[198]

The Supreme Court revised the parental rights of unwed fathers in several cases over the two decades that followed *Stanley*. It continued to insist that unwed fatherhood not be categorically ignored, but began to hammer out the degree to which states could still differentiate between the parental rights of unwed mothers and those of unwed fathers. In *Quilloin v. Walcott*, the Court upheld a provision of the Georgia code that denied an unwed father the right to veto a proposed adoption.[199] The child, born in 1964, lived primarily with his mother, Ardell Walcott.[200] She was never married to his father, Leon Quilloin but instead married another man in 1967.[201] After spending some time living with his grandmother following his mother's marriage, the child moved in with his mother and stepfather in 1969.[202] In 1976, Ardell's husband adopted her child and Leon moved to

194. *Id.*

195. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 648-51 (1974) (invalidating various school district policies that irrebuttably presumed pregnant teachers unfit to work at a certain point in pregnancy, regardless of individual ability or medical condition). On the demise of this doctrine, see John C. Jeffries, Jr. & Daryl L. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1237–38 (1998) (noting that the Court "threw in the towel" on this doctrine, which was awkwardly used to remedy "substantive concerns" with "procedural restrictions").

196. *See Stanley*, 405 U.S. at 654-57 (discussing cases that found due process violations); Bell v. Burson, 402 U.S. 535, 543 (1971) (invalidating Georgia license suspension system on due process grounds); Carrington v. Rash, 380 U.S. 89, 96 (1965) (invalidating Texas voter qualification law on due process grounds).

197. *Stanley*, 405 U.S. at 656-57.

198. *Id.* at 657.

199. 434 U.S. 246, 255-56 (1978).

200. *Id.* at 247.

201. *Id.*

202. *Id.* at 247 n.1.

prevent it.[203] Under the applicable Georgia law, however, an out-of-wedlock child could be adopted based solely on the consent of his mother unless his father had "legitimated" the child according to a statutory procedure.[204] Without legitimation, "the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives, including the power to veto the adoption of a child."[205] Leon filed a petition to legitimate his son after adoption proceedings were commenced, but the trial court denied it on grounds that legitimation was not, at this point, in the best interests of the child.[206]

Although this type of stark differentiation between unwed mothers and unwed fathers seemed to violate the principles elucidated in *Stanley* just six years earlier, the Court saw more substantial "countervailing interests" in this case.[207] In *Stanley*, the choice was between the children's remaining with their father or becoming wards of the state.[208] Here, in contrast, recognition of the unwed father's rights would stymie the mother's effort to cement an existing stable family unit consisting of mother, child, and stepfather. In *Quilloin*, the Court did not focus on the adequacy of the available procedures, as it had in *Stanley*, but on the substantive rights at stake.[209] The Court acknowledged the strong constitutional protection for the parent-child relationship, even outside of marriage.[210] Furthermore, the Court concluded that in this situation—involving an unwed father who never "had, or sought, actual or legal custody of his child" and an adoption that would "give full recognition to a family unit already in existence, a result desired by all concerned, except [the unwed father]"—the state was entitled to act solely on a finding of best interests, rather than the more onerous burden of proving the biological father unfit.[211]

The Court in *Quilloin* seemed to backtrack a bit from its position in *Stanley*. Two subsequent cases would provide further clues about the degree to which the parental rights of unwed fathers were constitutionally protected. In *Caban v. Mohammed*, the following year, the Court came out strongly, again, in favor of the unwed father's rights.[212] Abdiel Caban had fathered two children during the years he lived with their mother.[213] Later,

203. *Id.*
204. *Id.* at 248-49.
205. *Id.* (internal citation omitted).
206. *Id.* at 250.
207. *Id.* at 247-48.
208. Stanley v. Illinois, 405 U.S. 645, 658-59 (1972).
209. *Quilloin*, 434 U.S. at 247-48.
210. *Id.*
211. *Id.* at 255.
212. 441 U.S. 380, 394 (1979).
213. *Id.* at 382.

the mother married, and wanted her new husband to adopt the children, which Abdiel refused.[214] A provision of the New York Domestic Relations Law gave unmarried mothers, but not unmarried fathers, the right to consent to, or veto, the adoption of their child.[215] Defending the statute, the State argued that "a natural mother" usually has a "closer relationship with her child . . . than a father does."[216] But the Court rejected this notion and insisted that unwed mothers and unwed fathers be treated equally.[217]

The children in that case were four and six years old at the time of the proposed adoption and had spent time living with their biological father.[218] Given the Court's reasoning in *Quilloin*, Abdiel could make a much stronger claim as a social father, which ultimately bolstered his claim to be treated as a legal father. In *Caban*, however, the Court left open the question whether unwed fathers would have the same equal claim to infants, with whom they had not yet developed a social or emotional relationship. Just four years later, though, the Court said no. In *Lehr v. Robertson*, the Court held that unwed fathers—unlike unwed mothers—were not entitled automatically to full parental rights.[219] They had to assert paternity and take advantage of the opportunity to develop an attachment with their children.[220] The case involved a baby, Jessica M., who was born out of wedlock to Lorraine Robertson and Jonathan Lehr.[221] Lorraine married another man when Jessica was eight months old and petitioned for her new husband to adopt Jessica when she was two.[222] After a favorable report from the social service agency, a court approved the stepfather adoption.[223] The biological father, however, went to court, claiming that the adoption was invalid because he had not received notice of it prior to the proceeding.[224]

At the time of Jessica's birth, New York, like many other states, maintained a "putative father registry."[225] Unwed fathers can use this registry to notify the state of their intent to assert paternity over a child—or a potential child.[226] Putative fathers are, like certain other categories of

214. *Id.* at 383.
215. N.Y. DOM. REL. ACT § 111 (McKinney 1977), *invalidated by Caban*, 441 U.S. at 394.
216. *Caban*, 441 U.S. at 388.
217. *Id.* at 389.
218. *Id.* at 382, 389.
219. 463 U.S. 248, 262 (1983).
220. *Id.* at 250.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *See, e.g.*, N.Y. SOC. SERV. LAW § 372-c (McKinney 2011).
226. *Id.*; *Lehr*, 463 U.S. at 250-51.

men, such as those listed on a child's birth certificate or living openly with a child, entitled to notice of adoption proceedings.[227] Jonathan, however, met none of the criteria for notification. He did not file a petition for visitation and paternity until after the adoption proceeding had begun, and the court simply ignored it.[228] Jonathan argued that a putative father's "actual or potential relationship" with his child was a "liberty" protected by the Constitution, and that the differential treatment of unwed mothers and fathers was an equal protection violation.[229]

The Supreme Court upheld the New York law, ruling that Jonathan's biological tie to Jessica was not enough to justify full constitutional protection of his parental rights.[230] The Court distinguished between a "developed parent-child relationship," and a potential one.[231] The biological tie offers the natural father a unique opportunity to "develop a relationship" with the child, and if he "grasps that opportunity," and accepts some "responsibility for the child's future," he may "enjoy the blessings of the parent-child relationship."[232] But if not, the Constitution will not "automatically compel a state to listen to his opinion of where the child's best interests lie."[233]

Together, these rulings caused a dramatic shift in the treatment of unwed fathers under state law. Although states could still treat unwed fathers differently from unwed mothers—something that is still true today—they could not altogether preclude their recognition as legal parents, as Illinois and other states had routinely done before *Stanley*. The recognition of constitutional parental rights for unwed fathers spurred states to adopt new statutory schemes to identify legal fathers. The modern scheme is best exemplified by the Uniform Parentage Act (UPA), which was first proposed in 1973, and significantly amended in 2002.[234] Under the UPA, a man is the "legal father" of a child if any one of a list of criteria has been met—the adjudication or acknowledgment of paternity, marriage to the mother, open and notorious acknowledgment of fatherhood, or clear and convincing evidence of paternity.[235] The adoption of the UPA and similar statutes finalized a shift away from reliance on marital status as a proxy for biological fatherhood and towards recognition, and protection, of both

227. *Id.* at 255.
228. *Id.* at 252.
229. *Id.* at 266-67.
230. *Id.* at 262.
231. *Id.*
232. *Id.*
233. *Id.*
234. UNIF. PARENTAGE ACT art. 7 prefatory n. (amended 2002), 9B U.L.A. 67 (Supp. 2011).
235. UNIF. PARENTAGE ACT § 204 (amended 2002), 9B U.L.A. 22-23 (Supp. 2011).

burgeoning and full-fledged father-child relationships.

Before the 1970s and the UPA, parental rights and parental obligations did not necessarily coincide—at least not completely.[236] For legitimate children, they did. But for illegitimate children, a child might have a recognized relationship with his mother, but still be treated differently than his legitimate siblings. And he might have no recognized parent-child relationship with his father, and yet be entitled to some rights of support, inheritance, and so on. But the constitutional recognition of protection against illegitimacy discrimination and in favor of the parental rights of unwed fathers changed the landscape dramatically.[237] Even the marital presumption of paternity began to weaken, with most states shifting away, at least, from irrebuttable presumptions. Taken together, these developments gave rise to a new statutory approach that untethered legitimacy and parentage, on the one hand, and unified the meaning of legal parent status on the other. Legal parents had the same rights and obligations regardless of whether the children were born in or out of wedlock; any biological parent could become a recognized legal parent, as long as the right steps were taken.

III. THE UNWED FATHER V. THE LESBIAN CO-MOTHER: COMMON GROUND?

What do unwed fathers have to do with lesbian co-mothers? Despite the clear trend to disentangle legitimacy and parentage for children of heterosexual couples,—both married and unmarried—we see in some recent decisions the re-emergence of such ties in the context of lesbian co-parents.[238] Under these cases, without a second-parent adoption, children of lesbian co-parents have two legal parents only if the two women are married or in a civil union together. Otherwise, the biological or adoptive mother is the only legal parent. Legitimacy and parentage thus converge. For lesbian co-parents who have entered into a civil union or a same-sex marriage, a ruling like *Debra H.* will provide greater protection for their parenting rights in the event that the adult relationship dissolves via divorce

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236. *See generally* Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966) (discussing the problems of determining legal status for illegitimate children due to the lack of uniformity among state laws and uneven interpretation of common law principles by the courts).

237. *See* Gomez v. Perez, 409 U.S. 535, 538 (1978) ("A State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.").

238. *See, e.g.*, Debra H. v. Janice R., 930 N.E.2d 184, 184 (N.Y. 2010) (concluding that a civil union gives right to assert parentage).

or death. It may, in fact, provide *too* much protection, given how difficult it can be to dissolve same-sex relationships, especially civil unions.[239] Conceivably, civil union partners or same-sex spouses could make claims for visitation (or more) with respect to children who are born to a partner long after the actual relationship has broken down, yet while the parents are still technically in the union.[240] Or, biological mothers could make claims for child support against ex-partners who are not co-parents in any social sense, but are remain legally tied through a marriage or civil union.

But the more troubling consequence of re-entangling marital status and parentage is in its potential to restrict co-parents' rights, rather than to expand them. To the extent formal recognition of an adult relationship is deemed a prerequisite for parentage when there is no second-parent adoption, children of unmarried same-sex parents will be deprived of a second legal parent by sole reason of marital status. This is the approach dictated by *Debra H.*: the child has two legal parents only because the two women had established a civil union in another state before the birth.[241] This is a somewhat ironic rule in a state that did not itself allow the celebration of same-sex marriages or civil unions at that time.[242] The court's reaffirmation of *Alison D.*, and continuing rejection of de facto parentage, mean that the biological mother alone can decide whether to permit her female partner to adopt, whether to enter into a marriage or civil

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239. The dissolution problem arises because (1) states impose a residency requirement for divorce, but not marriage or civil union; and (2) most states that do not allow the celebration of same-sex marriages or civil unions also do not give effect to them, even for the limited purpose of granting a divorce. Thus, a gay or lesbian couple that marries or enters a civil union in one state may be stuck together, legally speaking, if they reside in a state that will not recognize their relationship. *See, e.g.*, Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002) (refusing to dissolve Vermont civil union); Chambers v. Ormiston, 935 A.3d 956 (R.I. 2007) (refusing to dissolve same-sex marriage contracted in Massachusetts); *In re* J.B. and H.B., 326 S.W.3d 654 (Tex. Ct. App. 2010) (refusing to grant divorce to two men who had married while living in Massachusetts and then moved to Texas). On this issue, see generally, Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 484-86 (2005); Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87 (2004).

240. Indeed, Janice R. had a second child, also conceived via artificial insemination, while still in a civil union with Debra H., though their social relationship had ended. The child is not mentioned beyond a footnote in the Debra H. ruling, which simply states that "[a]fter Janice R. and Debra H. broke up, Janice R. conceived another child through artificial insemination. Debra H. does not claim to have any developed any relationship with this child, who was born after she brought this action." 930 N.E.2d at 187. The question why these two children, both born during the civil union, are not subject to the same rule of joint parentage is troubling.

241. *Debra H.*, 930 N.E.2d at 197.

242. *See* Hernandez v. Robles, 855 N.E.2d 1, 1 (N.Y. 2006) (upholding the state's ban on same-sex marriage against a state constitutional challenge). On June 24, 2011, the New York legislature enacted a marriage equality bill to allow same-sex marriage. *See* N.Y. DOM. REL. LAW §§ 10-a, 10-b (McKinney 2011). The first gay marriages were celebrated thirty days later.

union that might result in joint parentage, or whether to consent to shared custody or visitation after a break-up. Yet the couple's decision as to which partner will bear the child may rest on considerations—such as fertility, age, and health—that have nothing to do with which of the two would be a better parent, let alone the *only* parent. It seems likely that the overwhelming majority of couples, when making the decision to go forward with childbearing, would agree that if they broke up, custody should be shared between them, regardless of legal formalities. Should this initial sentiment be honored by the law? Or should the biological mother's post-breakup desire to cut off all contact with the non-biological mother be honored in the absence of a formal tie like adoption or marriage?

How one answers these questions is a function of one's conception of parentage: what gives rise to parental status and the rights and obligations that flow from it? There is no exact parallel to this situation in the world of heterosexual childbearing. Under existing jurisprudence, an unwed father has constitutionally protected parental rights based on biology plus the efforts he makes to develop a filial relationship from the biological connection.[243]

Biology does not make a man a legal father, but it gives him the right to become one. A man who fails to grasp the opportunity to develop a functional parent-child can forfeit his parentage, but a child's mother cannot unilaterally extinguish it. This principle was tested, among other ways, in a cluster of high-profile adoption cases in the 1990s.[244] In the "Baby Richard" case, the birth mother told the biological father, falsely, that the baby had died.[245] Then she quietly consented to the baby's adoption, without the knowledge or consent of the biological father.[246] He successfully challenged the adoption, after it had become final, and Richard, age three, was returned to a father he has never met.[247]

"Baby Jessica" faced a similar fate.[248] Her unmarried mother named the wrong man on the birth certificate, perhaps to lead the real biological father astray, and then surrendered her baby for adoption.[249] But, the biological father eventually discovered the truth and successfully challenged the adoption.[250] Jessica, age two and a half, was returned to her biological

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243. *See supra* text accompanying notes 212-38.

244. *See, e.g., In re* Petition of Kirchner, 649 N.E.2d 324 (Ill. 1995).

245. *Id.*

246. *Id.* at 328.

247. *Id.* at 340.

248. *In re* B.C.G., 496 N.W.2d 239 (Iowa 1992); *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993).

249. *In re* B.C.G., 496 N.W.2d at 241.

250. *Id.*

father, amid a media circus.[251] The lesson of these cases was that an unwed father's rights cannot be extinguished at the mother's whim, even if the decision she makes is in the child's best interests. The unwed father has rights until he forfeits them—by consenting to adoption, by surrendering them in some other form, by committing abuse or neglect that justifies involuntary termination, or simply by failing to grasp the opportunity to build a relationship with the child.[252] Divorcing mothers may object to visitation by their ex-husbands. Unwed mothers may object to sharing custody or having their adoption plan vetoed by the child's father. But once recognized as legal fathers, these men, whether married to their children's mothers or not, have constitutional parental rights equal to those of the legal mother. Neither parent has a superior constitutional claim to control the child's time or relationships.

On what basis might we say that the biological mother is similarly constrained in her ability to sever ties unilaterally between her child and a lesbian co-parent? We have to go back to first principles of parentage. As we have seen, the act of giving birth—absent an enforceable surrogacy agreement—gives rise to legal motherhood; this is the rule across the country.[253] Thus, regardless of how a biological mother acts once the child is born, she is the legal mother with rights that cannot be taken away without sufficient cause—i.e., proof of abuse or neglect. Her parental rights are broad and include the right to "care, control, and custody" of her child.[254] This includes, as a general matter, the right to decide with whom her child develops relationship and the right to refuse third-party demands for custody of or visitation with the child, including those coming from grandparents and other relatives.[255] A legal father, in contrast, would stand on equal constitutional footing with the biological mother.

But what is the status of a lesbian co-parent without an obvious basis for parentage like adoption, or less obvious one like a marital presumption of "paternity?" She does not have the biological tie that would allow her to invoke the constitutional parental rights of an unwed father, nor any other basis in current law to demand constitutional protection for her right to parent a non-adopted, non-biological child.[256] To the contrary,

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251. *See* Isabel Wilkerson, *Michigan Couple Is Ordered to Return Girl, 2, to Biological Parents*, N.Y. TIMES, Mar. 31, 1993, http://www.nytimes.com/1993/03/31/us/michigan-couple-is-ordered-to-return-girl-2-to-biological-parents.html.

252. *See generally In re* Petition of Kirchner, 649 N.E.2d 324 (Ill. 1995) (discussing factors courts consider when determining if biological father has a legal right to child).

253. *See, e.g*, CAL. FAM. CODE § 7610 (West 2012).

254. Troxel v. Granville, 530 U.S. 57, 66 (2000).

255. *See id.*

256. That is not to say that she should not have any protected parental rights at the outset. Parentage based on intent is beginning to get some traction.

constitutional protection for the rights of parents versus non-parents, elucidated in *Troxel v. Granville*, militate against her claims vis-à-vis the child.[257] Her rights thus depend on whether a state chooses to elevate her status above other third parties – to assign her parentage or quasi-parentage based on intent, function, consent of the natural mother, or some combination of criteria.

In the jurisdictions in which lesbian co-parents have successfully gained recognition without the benefit of adoption or marriage, we see a range of approaches to reconciling the rights of the biological mother with the claims of a lesbian co-parent. The discussion here will highlight and contrast several existing approaches, while leaving a discussion of the best or most justifiable approach for another day. As discussed in Section I, the states that recognize de facto parentage have drawn on some combination of factors, generally including consent of the biological mother to the creation and development of the de facto parenting relationship and a sustained period of actual parenting by the lesbian co-parent. This approach puts great stock in the act of parenting, but only if the legal mother has first consented. The de facto parent cases take the view that a legal parent can consent to share the parental rights the Constitution grants her by inviting another adult into a child's life and encouraging the development of a functional parent-child relationship. Although courts emphasize different factors, all rulings are predicated on at least some notion of consent by the biological mother to parenting by her partner. As the court noted in *In re H.S.H.-K*, "[t]hrough consent, a biological or adoptive parent exercises his or her constitutional right of parental autonomy to allow another adult to develop a parent-like relationship with the child."[258] Adopting the same test in a lesbian co-parent case, the New Jersey Supreme Court emphasized that:

> Prong one [of the *H.S.H.-K* test] is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child. Without such a requirement, a paid nanny or babysitter could theoretically qualify for parental status. To avoid that result . . . the legal parent must have fostered the formation of the parental relationship between the third party and the child. By fostered is meant that the legal parent ceded over to the third party a measure of parental authority and autonomy and granted to that third party rights and duties vis-à-vis the child that the third party's status would not otherwise warrant.[259]

In that court's view,

257. 530 U.S. 57, 66 (2000).

258. *In re* H.S.H.-K, 533 N.W.2d 419, 436 n.40 (Wis. 1995).

259. V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000).

> [the] requirement of cooperation by the legal parent is critical because it places control within his or her hands. That parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child.[260]

Once that bond has been willingly created and fostered, the legal parent loses the right to unilaterally terminate the relationship between the psychological parent and the child. "In practice," the court continued, "that may mean protecting those relationships despite the later, contrary wishes of the legal parent in order to advance the interests of the child."[261]

De facto parentage, however, is not the only approach to recognition of lesbian co-parents rights. California has taken the notion of co-parentage one step further, by applying the parentage rules designed for fathers to co-mothers to the extent practicable. In 2005, the California Supreme Court issued three decisions on the same day that solidified both the rights and obligations of lesbian co-parents.[262] Confronting questions of child support and parental status, the court held, in essence, that a lesbian partner who agrees, with her partner, to bring a child into the world, but is not the child's biological mother, has the same rights and obligations as other legal parents.[263] Although the law in many jurisdictions has been developed piecemeal—with courts answering parentage questions case-by-case—the California trilogy was striking for its attempt to hammer out a general framework for courts' treatment of lesbian parents and their children. And these were the first opinions in the country to accord full parental status to two mothers without the benefit of a second-parent adoption, which California already allowed.[264]

In the first case, *Elisa B. v. Superior Court*, a woman named Emily was artificially inseminated with sperm from an anonymous donor and gave birth to twins.[265] Her partner, Elisa, had become pregnant the same way, with sperm from the same donor, a few months earlier.[266] In every respect, Emily and Elisa became parents together.[267] They had lived for several years prior as partners, had commingled their lives in financial and other

260. *Id.*

261. *Id.*

262. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005).

263. *See Elisa B.*, 117 P.3d at 670; *K.M.*, 117 P.3d at 681; *Kristine H.*, 117 P.3d at 693.

264. *See* Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).

265. *Elisa B.*, 117 P.3d at 663.

266. *Id.*

267. *Id.*

ways, and, together, had decided to have children.[268] They were present for each other's inseminations, prenatal medical appointments, and deliveries.[269] Emily and Elisa each breast-fed all three children and they identified themselves, in many contexts, as co-parents.[270] Emily stayed home with the children, one of whom had Down's Syndrome, and Elisa fully supported the five-member family.[271] However, neither Emily nor Elisa ever adopted the other's biological children.[272]

Emily and Elisa separated when the children were toddlers.[273] While Elisa continued to support Emily and the twins for sometime thereafter, she eventually ceased doing so.[274] Emily then sued for child support, and, in response, Elisa denied being the "parent" of Emily's twins; her position was that she was a mother only to the child to whom she had actually given birth.[275] In California, like other states, there is a bulky statutory and regulatory structure in place to ensure adequate support for children.[276] As a general matter, parents, regardless of gender, have a legal duty to support their children. What made the outcome of Emily's petition uncertain, however, is the requirement that an individual be considered a "parent" before being saddled with child support payments.

No one doubted that Emily was the mother of the twins to whom she had given birth. Consistent with California law, however, could Elisa—who had not adopted them—also be considered their mother? Or, put another way, can a child have two legal mothers? The California court, unanimously, said yes.[277] Parentage in California, as in many other states, is governed by the UPA, which defines the "parent and child relationship" for legal purposes.[278] Mothers are considered parents if they have given birth to, or legally adopted, a child.[279] Since Elisa had not legally adopted the twins, she could not, under this definition, be their mother. But, could she be something like a female father? The California UPA directs that the provisions related to the establishment of a father-child relationship should be applied to mother and child relationships as well, "insofar as practicable."[280] Legal fatherhood is more complicated than motherhood: a

268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* at 664.
273. *Id.*
274. *Id.*
275. *Id.* at 670.
276. *See* CAL. FAM. CODE § 3900 *et seq.* (West 2012).
277. *Elisa B.*, 117 P.3d at 673.
278. CAL. FAM. CODE § 7601.
279. *Id.* § 7610.
280. *Id.* § 7650.

man is presumed to be the father if he is the husband of the child's mother, if he voluntarily admits paternity, or if "receives the child into his home and openly holds out the child as his natural child."[281] Elisa did not marry Emily, but perhaps that was because she could not: gay marriage was not legal in California then.[282] But arguably, by co-parenting the twins, Elisa in some sense held them out as her own. Also, the structure of Elisa and Emily's arrangement—both opting to have children from the same male sperm donor—possibly bespeaks an intention to treat the children as part of the family, regardless of which partner gave birth to which child.

In deciding the case, the California Supreme Court had to grapple with one of its own precedents, *Johnson v. Calvert*.[283] There, the Court had addressed a triangle involving a husband who provided the sperm, his wife who provided the egg, and a surrogate who carried the child. It held that a child can have "only one natural mother."[284] That mother, the court decided, was the child's "biological" mother—the wife, rather than the surrogate.[285] It preferred that option to the solution of leaving the child with three legal parents. In *Elisa B.*, the court's words came back to haunt it. Could a child have more than one mother? Here, there were only two potential parents of the twins: Elisa and Emily. The UPA and similar laws all agree that an anonymous sperm donor has no legal relationship to any resulting child.[286] Emily is clearly a "natural mother" to the twins under California law; but, the court concluded, Elisa is also their parent.[287]

By analogy, the court applied one of the "presumed father" categories to Elisa.[288] She had, indeed, openly received the twins in her home and held them as her own "natural" children.[289] She had claimed them as dependents on her tax returns, told her employer she was the mother of triplets, and consented to the use of a hyphenated surname that combined the two women's names.[290] Along with Emily, Elisa even breastfed the

281. *Id.* § 7611.

282. It is not legal now, either. But, California had a brief window in which same-sex marriage was legal by virtue of a court ruling that banning same-sex marriage was unconstitutional. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). However, voters enacted a referendum, Proposition 8, six months later, which banned same-sex marriage. The constitutionality of Proposition 8 is the subject of ongoing litigation. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (invalidating Proposition 8 as a violation of the California Constitution), *aff'd*, Perry v. Brown, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

283. 851 P.2d 776 (Cal. 1993).

284. *Id.* at 778.

285. *Id.*

286. *See, e.g.*, UNIF. PARENTAGE ACT § 702 (amended 2002), 9B U.L.A. 355 (2001).

287. Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005).

288. *Id.* at 669.

289. *Id.* at 670.

290. *Id.*

twins, which is a greater physical connection than most presumed fathers could establish.[291] Prior California cases had established that a person could be considered a "natural" parent even when there was admittedly no biological connection between parent and child, so Elisa's lack of a biological relationship to the twins was not an insurmountable obstacle to the court's considering her their "natural mother."[292] Because Elisa had "actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting child or children would be raised by Emily and her as co-parents, and they did act as co-parents for a substantial period of time," the court refused to let Elisa, who wanted to deny parenthood, rebut the presumption of legal parenthood.[293] Thus, just as men who are not the biological father are sometimes held, nonetheless, to be the legal father of a child, Elisa was held to be a legal parent of Emily's twins.[294] This is the same result that would have been reached had the two women been registered as domestic partners under California law, which grants domestic partners all the rights and obligations of spouses, including rights with respect to a partner's child.[295]

The second case, *K.M. v. E.G.*, also involved two women claiming to be mothers of the same child.[296] K.M. donated eggs to her registered domestic partner, E.G., to use for in vitro fertilization (IVF).[297] But, at the time of the egg donation, K.M. signed a standard form relinquishing any claim to any resulting offspring.[298] However, she later wished to be considered the child's mother, over the objection of E.G.[299] Whether both women intended to be "parents" of these twins, is less clear than in *Elisa B.* K.M. claimed that they planned to raise any children together, while E.G. stated that she always intended to be a "single parent" with a "supportive" partner.[300] They raised the children together for five years, with intertwined lives, before splitting up in 2001.[301]

The legal posture of this case was different than in *Elisa B.* Here, K.M., unlike Elisa, had a biological connection to the twins. She was, after all, the egg donor. The question, then, was whether the provision stating that a man who donates sperm to a woman other than his wife is *not* the father of

291. *Id.* at 663.
292. *Id.* at 670-71.
293. *Id.* at 669.
294. *Id.*
295. *See supra* note 262.
296. 117 P.3d 673 (Cal. 2005).
297. *Id.* at 676.
298. *Id.*
299. *Id.*
300. *Id.* at 675-76.
301. *Id.* at 677.

any resulting child, should apply to her—or, alternatively, if the form relinquishing parental rights is binding. In another landmark decision, the California Supreme Court said no: since K.M. supplied eggs to her lesbian partner "in order to produce children who would be raised in their joint home," the sperm-donor-provision could not be used to block her status as a parent.[302] The court could have relied, as the appellate court did, on the "insofar as practicable" language of the UPA and treated K.M. like an anonymous sperm donor with no parental rights.[303] But, since those provisions are designed to facilitate *anonymous* sperm donation—a socially useful practice that permits infertile or single women to conceive children—the court found them inapplicable.[304] Men might be reluctant to donate sperm if parental rights or obligations might arise from the act. But the situation for K.M. and E.G. was obviously different, and the California Supreme Court agreed that the facts did not present a "true" case of "egg donation."[305] K.M. did not intend, after all, to give away her eggs, never to be seen again, as anonymous sperm—and, presumably, some anonymous egg—donors do. She intended, rather, that the eggs be used to produce children that would live with her. It was thus reasonable, under the UPA, to grant both her and E.G. parental status with respect to the twins.[306]

Given the decision in *Elisa B.*, the California court was not barred from declaring two women to be mothers of the same children. K.M. is the children's mother, the court concluded, because she provided the eggs from which they were produced, and E.G. is their mother because she gave birth to them.[307]

In the third case, *Kristine H. v. Lisa R.*, the court ruled that a woman, who had stipulated that her partner was the "second mother/parent" to her impending child, could not later deny that characterization.[308] While Kristine was pregnant, she and Lisa filed a "Complaint to Declare Existence of Parental Rights" with the superior court.[309] They took this step because state law would permit Lisa to be listed on the child's birth certificate—in the space provided for "father"—*only* if her parental status had been legally recognized first.[310] With stipulations from *both* Lisa and Kristine that Lisa would be the "other parent" of Kristine's baby, the court

302. *Id.*
303. *Id.* at 679.
304. *Id.*
305. *Id.* at 678.
306. *Id.* at 678-79.
307. *Id.* at 681-82.
308. 117 P.3d 690, 696 (Cal. 2005).
309. *Id.* at 692.
310. *Id.*

issued the requested judgment.[311] As a result, both women were listed on the birth certificate, and the baby was given a surname that combined the two women's last names.[312] Two years later, the women separated.[313] Lisa sought custody of the child, and Kristine asked that the court vacate the stipulated judgment of Lisa's parental status.[314] While this case presented some of the same questions as the two other cases decided that day, the court decided it on purely procedural grounds. The court ruled that estoppel principles prevented Kristine from changing her mind about Lisa's rights and asserting different facts in a later legal proceeding.[315] Equitable estoppel is generally invoked only to avoid harm; here, the reversal of her position on the rights of the co-parent would presumably have hurt not only Lisa, but the child as well, given the two years of social parenting.[316]

Application of the estoppel doctrine permitted the California court to dodge what might have been a tricky question: whether individuals can create parental status *by agreement*, if the provisions of the UPA do not otherwise establish it. Even with the concurrent decisions in *Elisa B.* and *K.M.*, it is not clear how the court might have ruled on this issue. Renouncing parental status by agreement is typically invalid, except in the special case of anonymous sperm donors, for it conflicts with exclusive state law definitions of parenthood, and because a third party, the child, is involved. But, creating parental status by agreement might be a different matter. Unlike an agreed renunciation, the agreed creation of parental status might inspire the kind of reliance the law arguably should be reluctant to disrupt: emotional reliance by all parties concerned, including, when the child is aware of the agreement.

Parentage by agreement is an approach that the Ohio Supreme Court seems to countenance. In a recent case, *In re Mullen*, the court ruled against a lesbian co-parent's claim for shared custody of a child whose birth and rearing she had been involved with at every step.[317] Three years into their relationship, Kelly Mullen and Michele Hobbs decided they would like to have a child.[318] A friend donated sperm, and Mullen became pregnant via IVF.[319] Mullen and the donor signed an agreement providing that while his name would be listed on the birth certificate, he would not

311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.* at 696.
316. *Id.* at 695-96.
317. 953 N.E.2d 302, 304 (Ohio 2011).
318. *Id.*
319. *Id.*

retain any parental rights or be obligated to support the child.[320] Hobbs, meanwhile, shared the expense of IVF.[321] Mullen executed a will and a health-care proxy in which she gave Hobbs the authority to act as Mullen's agent with respect to the child.[322] In these documents, Mullen stated that she was the legal parent, but that Hobbs was her "child's co-parent in every way."[323] Eventually, the relationship between Hobbs and Mullen broke down, and the sperm donor became involved in the child's life.[324]

Hobbs filed a complaint for shared custody, alleging that Mullen had "created a contract through her conduct with Hobbs to permanently share legal custody of the child."[325] The juvenile court ruled against Hobbs's claim, concluding that Mullen was a legal parent by virtue of biology; the sperm donor was a biological father with some potential to gain parental rights; and Hobbs was a non-parent, "despite her active role in raising and caring for the child."[326] The appellate court affirmed this decision.[327]

The Ohio Supreme Court affirmed the ruling that denied Hobbs any rights as a parent or co-parent.[328] But, in doing so, it made clear that a lesbian co-parent could acquire parenting rights by virtue of an enforceable shared-parenting agreement.[329] The court confirmed that a "parent may voluntarily share with a non-parent the care, custody, and control of his or her child through a valid shared-parenting agreement," the essence of which "is the purposeful relinquishment of some portion of the parent's right to exclusive custody of the child."[330] Such an agreement "recognizes the general principle that a parent can grant custody rights to a non-parent and will be bound by the agreement."[331] A valid shared-parenting agreement is enforceable as long as the co-parent is a "proper person to assume the care, training, and education of the child," and the agreement serves the child's best interests.[332] Thus, the problem for Hobbs was not that she could not have acquired custodial rights under law, but that, on the facts, she did not show sufficient evidence of a shared parenting agreement. Although Mullen had granted her some rights and responsibilities through

320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.* at 305.
327. *In re* Mullen, 924 N.E.2d 448 (Ohio Ct. App. 2009).
328. *Mullen*, 953 N.E.2d at 304.
329. *Id.* at 305-06.
330. *Id.*
331. *Id.* at 306.
332. *Id.* at 307.

various legal documents, those rights, the court found, were both revocable and revoked.[333] There was also evidence to suggest that Mullen had "consistently refused to enter into or sign any formal shared-custody agreement when presented with the opportunity to do so."[334] Although this approach disregards de facto parenting in many cases, the court felt that "the best way to safeguard both a parent's and a non-parent's rights with respect to children is to agree in writing as to how custody is to be shared, the manner in which it is shared, and the degree to which it may be revocable or permanent . . . ."[335]

A series of cases in North Carolina take a similar approach, by allowing a third party sometimes to gain the right to share custody even without being recognized as a legal parent.[336] The question presented under North Carolina law, when a third party requests custody or visitation, is whether the biological mother has acted inconsistently with paramount status vis-à-vis a child.[337]

In *Boseman v. Jarrell*, Julia Boseman and Melissa Jarrell had been in a committed intimate relationship for several years when they decided to start a family.[338] They decided that Jarrell would bear the child, but both women were involved in every stage of the process.[339] Julia helped select a sperm donor, accompanied Melissa on doctor visits, read and sang to the child in utero, and was present for the delivery of the baby in October, 2002.[340] They gave the child a hyphenated last name using both of their own surnames, held a baptism at which they were publicly presented as the child's "parents," and functioned, for the first several years, as equal co-parents.[341] In 2004, the parties sought an adoption that would allow Julia to adopt the child, while allowing Melissa to retain her full legal rights as a parent.[342] Although the North Carolina Code did not expressly allow for a so-called "second-parent adoption" such as this one, the petition was granted by a trial court judge in Durham County in 2005.[343] The adoption decree explicitly stated that it would create a full parent-child relationship between Julia and the child, while "not sever[ing] the relationship of parent

333. *Id.*

334. *Id.* at 308.

335. *Id.*

336. *See, e.g.*, Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010) ("By intentionally creating a family unit in which defendant permanently shared parental responsibilities with plaintiff, defendant acted inconsistently with her paramount parental status.").

337. *Id.* at 496.

338. *Id.* at 496-97.

339. *Id.* at 497.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

and child between the individual adopted and that individual's biological mother."[344] The decree, in other words, gave the child two legal mothers—one biological, and one adoptive.[345] The Division of Social Services, however, refused to "index" the adoption.[346] The court instructed the clerk to ignore a statutory requirement that the decree be transmitted to the Division and ordered it, instead, to "securely maintain this file in the clerk's office."[347]

The following year, the two women terminated their relationship.[348] Julia continued to provide the bulk of the financial support for both Melissa and the child.[349] But Melissa soon reduced Julia's contact with the child, despite admitting that Julia was a "very good parent" and had a loving relationship with the child.[350] When Julia filed a complaint seeking custody, Melissa attacked the validity of the adoption decree, arguing that the court did not have the power under North Carolina law to grant it in the first instance.[351] If the adoption decree was void, she argued, Julia was not a "parent" and thus could not seek custody.[352] The trial court held, however, that it did not have the power to invalidate an adoption granted by a sister court.[353] Thus, Julia, like Melissa, was a legal parent and entitled to a determination of custody based on the best interests of the child—with neither mother having a presumptive right of custody. The Court of Appeals affirmed all aspects of this ruling.[354]

On appeal to the North Carolina Supreme Court, this case took a surprising turn. The court accepted Melissa's argument that the adoption was void ab initio.[355] Because adoption law is entirely statutory, the court ruled that the trial court did not have the power to grant an adoption that was not authorized by the code.[356] The code allows for a traditional adoption, in which a child is placed, privately or through an agency, with an adoptive parent or parents.[357] The adoption severs the relationship with the biological parents and replaces it with a full legal relationship with the

344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.* at 498.
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. Boseman v. Jarrell, 681 S.E.2d 374, 380 (N.C. App. 2009), *rev'd* 704 S.E.2d 494 (N.C. 2010).
355. *Boseman*, 704 S.E.2d at 496.
356. *Id.*
357. N.C. GEN. STAT. ANN. § 48-3-201 (2011).

adoptive parent(s).[358] The code also allows for a stepparent adoption, which allows a stepparent, with the consent of the spouse-parent, to adopt a stepchild.[359] This type of adoption has no effect on the legal relationship between the biological spouse-parent and child.[360] But because Julia and Melissa were not married—and, even if they were, a same-sex marriage cannot be recognized in North Carolina[361]—Julia could not pursue a stepparent adoption, and the code does not seem to contemplate for any other type of second-parent adoption. In the view of the North Carolina Supreme Court, the trial court attempted to authorize a modified private placement adoption—one that would add an additional parent, without taking away an existing one—that the code does not allow.[362] The requirements that the consenting parent acknowledge the effect of an adoption on her rights and obligations and that the decree "must sever the former parent-child relationship" are not waivable by a court.[363] And, because the court did not have authority to grant the adoption sought by the petitioner, it did not have jurisdiction to consider the matter at all.[364] It thus declared the adoption void ab initio.[365] Putting aside the obvious problems with invalidating an adoption six years after the fact, and casting doubt on any number of other second-parent adoptions granted by North Carolina courts,[366] the invalidation of the adoption decree returned Julia to the status of "non-parent."

Despite invalidating the second-parent adoption, the North Carolina Supreme Court felt that this was not a typical parent versus non-parent dispute. Although this child has only one legal parent, Melissa had, by inviting Julia to function as a parent on a non-temporary basis, "acted inconsistent with her constitutionally protected, paramount parental status."[367] The court reasoned that a parent could lose out on the absolute nature of parental rights not only by demonstrating unfitness—and risking involuntary termination of parental rights—but also through a "voluntary grant of non-parent custody."[368] In a prior case, *Price v. Howard*, the court

358. *Id.* § 48-1-106(c).

359. *Id.* § 48-4-101.

360. *Id.* § 48-1-106(d).

361. *Id.* § 51-1.2.

362. Boseman v. Jarrell, 704 S.E.2d 494, 501 (N.C. 2010).

363. *Id.* at 500.

364. *Id.* at 501.

365. *Id.*

366. For one perspective on these issues, see Nancy Polikoff, *Yes, The North Carolina Adoption Ruling Really Is That Bad*, BEYOND (STRAIGHT AND GAY) MARRIAGE (Dec. 23, 2010, 5:20pm), http://beyondstraightandgaymarriage.blogspot.com/2010/12/yes-north-carolina-adoption-ruling.html.

367. *Boseman*, 704 S.E.2d at 496.

368. *Id.* at 503.

focused on a mother's decision to tell a man, untruthfully, that he was the biological father of her child and then to create a family unit that included him and "allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated."[369] She had also relinquished complete custody of the child to him for a period of time.[370] Under those circumstances, the court refused to defer to the legal mother's near-absolute right to determine the care and custody of her child.[371] It treated the resulting custody dispute between the mother and the de facto father as one between parents, which are governed by a simple "best interests" standard.[372] The court ruled similarly in *Mason v. Dwinnell*, in which a lesbian couple decided together to start a family and "intentionally took steps to identify the [non-biological mother] as a parent of the child."[373] Although the legal mother had never relinquished custody to her partner, the two women had been relatively equal co-parents.[374] That the biological mother chose to share indefinitely both decision-making authority, evidenced in part by execution of a parenting agreement, and custody with the non-biological co-parent meant that she had relinquished her paramount parental status.[375] According to the court, "the gravamen of 'inconsistent acts' is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party."[376]

In *Boseman*, the court found that these same factors—consent for a third party to be treated as a parent with no indication of temporary status—were established by clear and convincing evidence.[377] Melissa "intentionally and voluntarily created a family unit in which [Julia] was intended to act—and acted—as a parent," with "no expectation that this family unit was only temporary."[378] Melissa "acted inconsistently with her paramount parental status," and thus was entitled to no heavy thumb on the scale in a custody dispute with Julia.[379] Julia, who had been invited to act as a parent indefinitely, was entitled to joint custody of the child.[380] Although *Boseman* is unusual in granting shared custody to someone formally labeled a non-parent, it treats consent to share parental rights in much the

369. 484 S.E.2d 528, 537 (N.C. 1997).
370. *Id.*
371. *Id.*
372. *Id.*
373. 660 S.E.2d 58, 70 (N.C. 2008).
374. *Id.* at 67.
375. *Id.*
376. *Id.* at 70.
377. Boseman v. Jarrell, 704 S.E.2d 494, 504 (N.C. 2010).
378. *Id.*
379. *Id.*
380. *Id.*

same manner as do courts that recognize de facto parentage.

Let's return to *Debra H.*, in which the New York Court of Appeals ruled that a lesbian co-parent could not be recognized as a de facto or any other kind of parent on the basis that the biological mother had consented to the co-parent's assumption of a parent-like role.[381] The lesbian co-parent could, however, be recognized as a legal parent because she had entered into a civil union with the biological mother. Why? When we indulge a marital presumption of paternity, marriage is largely a proxy for biology. In the absence of contradictory evidence, we assume that married women are having sex only with their husbands and, thus, that any children conceived are genetically related to them. This was particularly appropriate before the late twentieth century, when legitimate sex was confined to marriage. Most children of married women were sired by the husband; and, for the ones that were the product of adultery, the law had no desire to provide a mechanism for proving it or to destabilize the family unit that might otherwise survive the indiscretion.[382]

In the context of two women who together plan for the conception and birth of a child, what is marriage a proxy for? It is certainly not a proxy for biology—our best guess about the identity of the child's other genetic parent—as it was for married fathers. Marriage seems to stand here as a proxy for consent of the definite legal parent—the biological mother—to share parental rights. In defending its requirement of a formal legal tie as a prerequisite for parentage, the *Debra H.* court observed: "And both civil union and adoption require the biological or adoptive parent's legal consent, as opposed to the indeterminate implied consent featured in the various tests proposed to establish de facto or functional parentage."[383] But consent to what? Why is the decision to enter a marriage or civil union evidence of consent to share parentage of children conceived via artificial insemination or, at a minimum, with genetic material from a third party? The "implied consent" of de facto parentage may, indeed, be "indeterminate"; but it also speaks directly to the relevant question: did the biological mother intend to share her otherwise absolute parental rights with another adult?

CONCLUSION

There are no easy answers to questions of parentage in this or any number of other complicated contexts. It is thus not entirely surprising that some courts have gravitated towards bright-line rules about who is, and

381. Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010).

382. For children conceived out of wedlock, the desire to ignore illegitimate, non-marital sex meant that the law simply pretended they had no father.

383. *Debra H.*, 930 N.E.2d at 196.

who is not, a parent. Certainty is a relevant value. But it is not the only value. This Article seeks to shed some light on the irony of returning to a regime that looks exclusively to marital status to determine parentage, when the trend in most other contexts has been decidedly in the other direction. The question of why courts might have retreated in this way is no doubt complicated, but what made it possible is the different constitutional footing of unwed fathers, on the one hand, versus lesbian co-parents, on the other. States were simply stopped in their tracks at some point when they continued to insist that illegitimate children had no fathers. The beginnings of a trend towards non-marital childbearing and an increasingly strong view about the need for children to be supported by their parents rather than welfare money put pressure on this traditional approach to parentage, but the Supreme Court finished the job by elevating the rights of unwed fathers to constitutional status.

For lesbian co-mothers, the social pressure towards recognition of multiple parents—a clear benefit to children—may be the same, but the constitutional pressure pushes in the opposite direction. Not only do co-parents not have the biological tie that gives rise to the protection for unwed fathers, but recognition of lesbian co-parents' rights has the potential to infringe on the constitutionally protected parental rights of the biological or adoptive mother.[384]

At the same time, however, it became possible for gays and lesbians to marry or enter marriage-equivalent statuses in a handful of states and foreign jurisdictions. This provided courts an opportunity to provide greater recognition of co-parent rights—allowing parent-child ties to be established through blood, adoption, or marriage/civil union—while reigning in the more fluid and complicated doctrines that arise from a purely functional model of parentage. This confluence of developments is pushing the law of parentage for children of gays and lesbians back through time rather than forward. And while children of unmarried, same-sex parents are presumably protected against illegitimacy discrimination just like children of unmarried, opposite-sex parents, their illegitimacy may cost them something more important—a second legal parent.

It may be that courts are at least indirectly using the marital status of lesbian couples as a proxy for consent to share parentage; that is, they assume that the biological mother who conceives—or even gives birth to—children after entering into a formal legal relationship with a partner intends the partner to share parental rights and responsibilities. But if this is the case, they are using a blunt instrument indeed. The partner's

384. The degree to which the various doctrines regarding lesbian co-parentage successfully reconcile this tension is an important question, but not one fully resolved here.

functional role in parent-like activities over a period of time—particularly if the partner was involved in the decision to conceive a child in the first place—would seem a much better indicator of consent to share the role of parent than whether the couple said vows to each other at some point. The de facto parentage doctrine is not a perfect solution. It can be messy and provide no answer to the question of parentage without long, drawn-out litigation. But, it provides a backstop at least to prevent one parent from unilaterally extinguishing a co-parent's relationship with a child, possibly to the grave detriment of both the child and the co-parent. Regardless of the mechanism, the question whether a child was born into a marriage should be kept separate from the question whether that child has two parents.